No. 96-8986-CFH Title: Arnold F. Hohn, Petitioner
v.
United States

Docketed: May 14, 1997 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	May 12 1997	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 18, 1997)
	Jun 5 1997	Order extending time to file response to petition until July 14, 1997.
	Jul 14 1997	Order further extending time to file response to petition until August 18, 1997.
	Aug 15 1997	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Aug 18 1997	Brief amicus curiae of Families Against Mandatory Minimums Foundation filed.
	Aug 18 1997	Brief of respondent United States in opposition filed.
	Aug 28 1997	DISTRIBUTED. September 29, 1997
	Sep 18 1997	Reply brief of petitioner Arnold F. Hohn filed.
	Oct 6 1997	REDISTRIBUTED. October 10, 1997
	Oct 14 1997	REDISTRIBUTED. October 17, 1997
	Oct 27 1997	REDISTRIBUTED. October 31, 1997
	Oct 31 1997	Petition GRANTED. limited to the following question: In light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Solicitor General? Jeffrey S. Sutton, Esquire, of Columbus, Ohio, a member of the Bar of this Court, is invited to brief and argue this case, as amicus curiae, against this Court's jurisdiction. SET FOR ARGUMENT March 3, 1998. **********
	Dec 4 1997	Order extending time to file brief of petitioner on the merits until December 23, 1997.
	Dec 15 1997	Joint appendix filed.
	Dec 22 1997	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Dec 23 1997	Brief of respondent United States filed.
	Dec 29 1997	Brief of petitioner Arnold F. Hohn filed.
	Jan 6 1998	Motion of Solicitor General for divided argument filed.
	Jan 12 1998	Motion of Solicitor General for divided argument GRANTED. to be divided as follows: petitioner - 25 minutes; the Solicitor General - 10 minutes; amicus curiae in support of judgment below - 25 minutes.
	Jan 14 1998	Order extending time to file brief of respondent on the merits until January 28, 1998.
	Jan 14 1998	CIRCULATED.
	Jan 14 1998	Record filed.
	Jan 20 1998	Record filed.
	Jan 21 1998	Application (A97-527) for certificate of appealability,

No. 96-8986-CFH

Entry	Date	Proceedings and Orders
		submitted to Justice Thomas.
	Jan 28 1998	Brief amicus curiae of Jeffrey Sutton filed at invitation of Court.
	Jan 29 1998	Response to application (A97-527) filed by United States.
	Feb 6 1998	(A97-527) Motion of amicus curiae for leave to file a response to application and response of the Solicitor General filed.
	Feb 12 1998	Reply brief of United States filed.
	Feb 23 1998	Reply brief of petitioner Arnold F. Hohn filed.
	Feb 24 1998	Petitioner's Hohn's reply in support of Application for a Certificate of Appealability (A-527).
	Feb 25 1998	Letter from counsel for the petitioner received and distributed.
	Mar 2 1998	Letter from counsel for the petitioner received and distributed.
	Mar 3 1998	ARGUED.

EDITOR'S NOTE

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96-8986

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Petitioner,

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. Whether a federal prisoner who demonstrates that he is incarcerated for conduct that this Court conclusively determined does not constitute a federal crime has made "a substantial showing of the denial of a constitutional right" warranting issuance of a certificate of appealability under 28 U.S.C. § 2255.

2. Whether a defendant's failure to raise an argument on direct appeal, when that argument was foreclosed by binding circuit precedent and had been uniformly rejected by other circuits, constitutes a knowing and intelligent "waiver," precluding any showing of "cause and prejudice" or other excuse for the procedural default in a collateral review proceeding.

3. Whether a defendant who possesses a firearm and drugs in close proximity to each other, but neither bears the firearm on his person, nor otherwise transports it, commits the crime under 18 U.S.C. § 924(c) of "carr[ying]" a firearm "during and in relation to" the predicate offense of possession of the drugs with intent to distribute them.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . (I)

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 7

I. THE QUESTION WHETHER A CERTIFICATE OF APPEALABILITY SHOULD ISSUE UPON A SECTION 2255 PETITIONER'S SUBSTANTIAL SHOWING THAT HE IS INCARCERATED FOR CONDUCT THIS COURT HAS HELD IS NOT A CRIME IS IMPORTANT AND RECURRING 7

A. The Proper Interpretation of Section 2253(c)'s Appealability Requirement of a "Substantial Showing of the Denial of a Constitutional Right" Is a Question of Great Importance and Will Affect Countless Cases 7

B. The Eighth Circuit's Analysis is Incorrect 9

C. The Courts of Appeals Are Deeply Divided Over Whether Section 2253(c) Permits Appeal of Meritorious Federal Statutory Claims 17

II. THE EIGHTH CIRCUIT'S NOVEL WAIVER DOCTRINE CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND IS INCOMPATIBLE WITH THIS COURT'S PROCEDURAL DEFAULT CASES 20

A. The Eighth Circuit's Decision Conflicts With The Approach of Other Circuits 21

B. The Eighth Circuit's Waiver Rule Creates An End Run Around The Established Framework For Deciding Whether Collateral Relief Is Available for Procedurally Defaulted Claims 23

C. The Issue Is Important And The Eighth Circuit's Analysis Is Seriously Flawed 27

III. THE PROPER DEFINITION OF THE CRIME OF "CARR[YING] A FIREARM" UNDER 18 U.S.C. § 924(C) IS AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW THAT WOULD BENEFIT FROM CLARIFICATION BY THIS COURT 29

A. The Scope of "Carrying" Liability Is An Important And Recurring Issue 30

B. The Courts Of Appeal Are In Disarray Over What It Means To "Carry" A Firearm And Would Benefit From Guidance From This Court 30

C. The Government Failed To Prove That Petitioner "Use[d] or Carrie[d] A Firearm" 33

D. Because The Jury Instruction Grossly Misstated The Law, Petitioner Is Entitled, At A Minimum, To A New Trial 39

CONCLUSION 41

TABLE OF AUTHORITIES

Page

Cases

Bailey v. *United States*, 116 S. Ct. 501 (1995) . . . . . *passim*

Barefoot v. *Estelle*, 463 U.S. 880 (1983) 14

Bell v. *United States*, 349 U.S. 81 (1955) 38

BMW v. *Gore*, 116 S. Ct. 1589 (1996) 12

Bordenkircher v. *Hayes*, 434 U.S. 357 (1978) 12

Bousley v. *Brooks*, 97 F.3d 284 (8th Cir. 1996) 12, 21

Callanan v. *United States*, 881 F.2d 229 (6th Cir. 1989) 23, 25, 26

Coleman v. *Thompson*, 501 U.S. 722 (1991) 24

Dalton v. *United States*, 862 F.2d 1307 (8th Cir. 1988) 26

Davis v. *United States*, 417 U.S. 333 (1974) 11, 13, 19, 26

Drinkard v. *Johnson*, 97 F.3d 752 (5th Cir. 1996), cert. denied 117 S. Ct. 1114 (1997) 18

Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1874) 9, 17

Ex Parte Watkins, 28 U.S. (3 Pet.) 193 (1830) 9

Hunter v. *Bailey*, 101 F.3d 1565 (11th Cir. 1996) 17

In re Winship, 397 U.S. 358 (1970) 13

Ingber v. *Enzor*, 841 F.2d 450 (2d Cir. 1988) 27

Jackson v. *Virginia*, 443 U.S. 307 (1979) 13

Johnson v. *United States*, 805 F.2d 1284 (7th Cir. 1987) 10, 19

Johnson v. *United States*, No. 96-203, slip op. 6 (U.S. May 12, 1997) 28

Lee v. *United States*, ___ F.3d ___, No. 96-3323, 1997 WL 213972 (7th Cir. Apr. 30, 1997) 21, 22, 27, 28

Lennox v. *Evans*, 87 F.3d 431 (10th Cir. 1996), cert. denied, 117 S. Ct. 746 (1997) 18, 19

Lynce v. *Mathis*, 117 S. Ct. 891 (1997) 19

Magnuson v. *United States*, 861 F.2d 166 (7th Cir. 1988) 27

McNally v. *United States*, 483 U.S. 350 (1987) 7

Mizen v. *United States*, No. 96-3478, 1997 WL 117037 (6th Cir. Mar. 13, 1997) 21, 22, 27

Murray v. *Carrier*, 477 U.S. 478 (1986) 24

North Carolina v. *Pearce*, 395 U.S. 711 (1969) 12

Palko v. *Connecticut*, 302 U.S. 319 (1937) 12

Ratzlaf v. *United States*, 510 U.S. 135 (1994) 7

Reed v. *Farley*, 114 S. Ct. 2291 (1994) 15

Reed v. *Ross*, 468 U.S. 1 (1984) 24

Reyes v. *Keane*, 90 F.3d 676 (2d Cir. 1996) 18

Rivers v. *Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994) 11

Robinson v. *Shell Oil Co.*, 117 S. Ct. 843 (1997) 13, 14

Rochin v. *California*, 342 U.S. 165 (1952) 12

Santana v. *United States*, 98 F.3d 752 (3d Cir. 1996), pet. for cert. filed (U.S. Mar. 19, 1997) 15

Sawyer v. *Whitley*, 505 U.S. 333 (1992) 26

Smith v. *United States*, 113 S. Ct. 2050 (1993) 35

Teague v. *Lane*, 489 U.S. 288 (1989) 11

United States v. *Andrade*, 83 F.3d 729 (5th Cir. 1996) 23

United States v. *Apker*, 101 F.3d 75 (1996) 6, 13, 17, 19

United States v. *Barnhardt*, 93 F.3d 706 (10th Cir. 1996) 21, 27

United States v. *Canady*, 920 F. Supp. 402 (W.D.N.Y. 1996) 32

United States v. *Cleveland*, 106 F.3d 1056 (1st Cir. 1997) 31, 35

United States v. *Cooke*, No. 96-1852, 1997 U.S. App. LEXIS 6645 (7th Cir. April 9, 1997) 30, 31, 32

United States v. *Cota-Loiaiza*, 936 F. Supp. 751 (D. Colo. 1996) 11

United States v. *David*, No. 96-1391, 1997 WL 26581 (10th Cir. Jan. 24, 1997) 18

United States v. *Deases*, No. 96-3152, 1996 WL 557661 10th Cir. Oct. 1, 1996, cert. denied, 117 S. Ct. 746 (1997) 18

United States v. *Frady*, 456 U.S. 152 (1982) 23-24

United States v. *Giraldo*, 80 F.3d 667 (2d Cir.), cert. denied, 117 S. Ct. 135 (1996) 31

United States v. *Gomez*, 24 F.3d 924 (7th Cir. 1994) 27

United States v. *Gorecki*, No. 96-4092, 1997 WL 74 (10th Cir. Apr. 1, 1997), pet. for cert. filed (Apr. 18, 1997) 18

United States v. *Handa*, 110 F.3d 42 (9th Cir. 1997) 23

United States v. *Harrison*, 103 F.3d 986 (D.C. Cir. 1997) 39

United States v. *Hayman*, 342 U.S. 205 (1952) 16

United States v. *Hillary*, 106 F.3d 1170 (4th Cir. 1997) 23

United States v. *Johnson*, 457 U.S. 537 (1982) 11

United States v. *Joseph*, 109 F.3d 34 (1st Cir. 1997) 22

United States v. *Loschiavo*, 531 F.2d 659 (2d Cir. 1976) 13, 19

United States v. *McJoy*, No. 95-15565, 1996 WL 528422 (9th Cir. Sept. 13, 1996) 28

United States v. *McKie*, 73 F.3d 1149 (D.C. Cir. 1996) 11, 27

United States v. *McKinney*, 79 F.3d 105 (1996), pet. for cert. filed (U.S. Oct. 11, 1996) 20

United States v. *McKinney*, 79 F.3d 105 (8th Cir. 1996) 5, 6, 28

United States v. *Miller*, 84 F.3d 1244 (10th Cir.), cert. denied, 117 S. Ct. 443 (1996) 31

United States v. *Mitchell*, 104 F.3d 649 (4th Cir. 1997) 31

United States v. *Moore*, 76 F.2d 111 (6th Cir. 1996) 32

United States v. *Riasco-Suarez*, 73 F.3d 616 (6th Cir.), cert. denied, 117 S. Ct. 136 (1996) 31

United States v. *Rocha*, 109 F.3d 225 (5th Cir. 1997) 23

United States v. *Salerno*, 481 U.S. 739 (1987) 12

United States v. *Shelton*, 848 F.2d 1485 (10th Cir. 1988) 23, 25, 26

United States v. *Sood*, 969 F.2d 774 (9th Cir. 1992) 27

United States v. *Staples*, 85 F.3d 461 (9th Cir.), cert. denied, 117 S. Ct. 318 (1996) 31

Williams v. *Calderon*, 83 F.3d 281 (9th Cir. 1996) 18

Statutes

18 U.S.C. § 1341 7

18 U.S.C. § 1343 7

18 U.S.C. § 924(a)(5)(B)(ii) 36

18 U.S.C. § 924(b) 31, 36

18 U.S.C. § 924(c) . . . . . *passim*

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2253(c) . . . . . *passim*

28 U.S.C. § 2253(c)(2) . . . . . *passim*

28 U.S.C. § 2254 5

28 U.S.C. § 2254(a) 1

28 U.S.C. § 2255 . . . . . *passim*

28 U.S.C. § 2262(b)(3) 14

31 U.S.C. § 5322(a) 7

31 U.S.C. § 5324(3) 7

Fed. R. App. P. 22(b) 15

PETITION FOR A WRIT OF CERTIORARI

Arnold F. Hohn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 99 F.3d 892. The order denying rehearing en banc (Pet. App. 21a) over the dissent of Judges Beam, Hansen, Loken, and McMillian is unreported. The opinion of the court of appeals affirming petitioner's conviction on direct appeal (Pet. App. 14a-20a) is reported at 8 F.3d 1301.

JURISDICTION

The order of the United States Court of Appeals for the Eighth Circuit denying Hohn's petition for rehearing was entered on February 10, 1997. Pet. App. 21a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2253(c) of Title 28 of the United States Code provides, in pertinent part: "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * the final order in a proceeding under Section 2255. * * * A certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right."

The Due Process Clause of the Fifth Amendment of the Constitution of the United States provides, in pertinent part: "No person shall * * * be deprived of * * * liberty * * * without due process of law * * *."

Section 924(c)(1) of Title 18 of the United States Code provides, in pertinent part: "Whoever, during and in relation to any crime of violence or drug trafficking crime * * * uses

or carries a firearm, shall, in addition to the punishment provided for such crime * * *, be sentenced to imprisonment for five years * * *, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment * * *."

STATEMENT

Arnold Hohn was convicted and is presently incarcerated for conduct — purportedly "using" a firearm by merely having it "available" to him during his possession of a controlled substance — which this Court held in *Bailey* v. *United States*, 116 S. Ct. 501 (1995), is not a crime. After learning of the *Bailey* decision, Hohn filed a motion seeking collateral relief pursuant to 18 U.S.C. § 2255 from his unlawful incarceration.

The district court denied Hohn's collateral challenge, finding that he had "waived" it by failing to prognosticate that this Court, several years after Hohn's conviction had become final, would reverse well-settled precedent and redefine the meaning of the criminal statute under which he was charged. Pet. App. 8a-9a. The court of appeals refused to accept Hohn's appeal, relying on a provision of the new Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. 2253(c), which allows an appeal to be taken from the denial of a Section 2255 motion only upon the issuance of a "certificate of appealability" (which in turn requires the movant to make "a substantial showing of the denial of a constitutional right"). 28 U.S.C. § 2253(c). In the court of appeal's view, Hohn's claim that he was incarcerated for conduct that was not a crime did not meet that standard because Hohn was asserting the denial of a "statutory" rather than a "constitutional" right.

1. On June 20, 1990, police armed with a no-knock warrant searched Hohn's home after a confidential informant told them that Hohn was selling methamphetamine. Pet. App. 15a.

They testified that they found three firearms near methamphetamine in the kitchen (Tr. 163-168), two firearms in a box in the kitchen (Tr. 418-420), and one firearm a few feet away from methamphetamine in the bedroom (Tr. 212). In Hohn's bedroom, the police also observed a wall-mounted gun case containing a collection of rifles and shotguns (Tr. 508-509). When they arrested him in his living room, Hohn was not carrying any weapon and no weapons were found in the living room. Pet. App. 3a; Tr. 367-368.

At trial, no witnesses testified that they had observed Hohn use or carry any weapon during and in relation to his predicate offense. Hohn admitted possession of the methamphetamine and firearms but testified that he owned the firearms because he is an avid hunter and gunsmith, and because his house had been burglarized and vandalized repeatedly. Pet. App. 3a; Tr. 1107-1110. Only one witness, Cindy Vandry, testified to having purchased, or witnessed a purchase, of drugs from Hohn. Vandry admitted that she had never seen Hohn use or carry any weapon (Tr. 454, 456), and that the only weapons she had observed when she visited his home were located in a closed, wall-mounted gun case (Tr. 454-455).

Consistent with then-controlling Eighth Circuit precedent and Eighth Circuit Model Jury Instructions (see note 1, *infra*), the trial court gave the following instruction to the jury on the meaning of the terms "use" and "carry" in 18 U.S.C. § 924(c):

> The phrase 'used a firearm' means having a firearm available to aid in the commission of possession of Methamphetamine with intent to distribute. Similarly, the phrase 'carried a firearm' does not require proof of actual possession of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was available to provide protection in connection with the possession of Methamphetamine with intent to distribute or to facilitate success.

Pet. App. 31a; see also *id.* at 29a-30a. The trial judge gave the instruction over the objection of Hohn's attorney, who argued that it improperly "allowed the jury to find that merely having a firearm available" nearby during a drug offense constitutes "use." Pet. App. 28a-30a.

Hohn was convicted of drug possession, firearm possession, and "using or carrying" a firearm in violation of Section 924(c). On July 8, 1992, Hohn was sentenced to 90 months — 30 months for other crimes and 60 months (to be served consecutively) for the Section 924(c) conviction. Hohn has been incarcerated for the last three years solely based on his conviction for "using or carrying" a firearm in violation of Section 924(c).

2. Hohn appealed to the Eighth Circuit, but did not challenge the "use or carry" jury instruction or his conviction under Section 924(c). At the time of his appeal, the Eighth Circuit — like most other courts — had repeatedly interpreted the term "use" in Section 924(c) expansively to include the "mere presence and availability" of a firearm in a house in which drugs were discovered.[1] Thus, the jury instruction given at Hohn's trial was consistent with controlling, well-established Eighth Circuit law, and any argument to the contrary would have been rejected, if not dismissed as frivolous. Hohn's conviction was affirmed. Pet. App. 14a-20a.

3. Several years after Hohn's conviction was affirmed, this Court issued its decision in *Bailey*, substantially narrowing the range of conduct the lower courts had deemed criminal under

[1] *E.g.*, *United States* v. *Boykin*, 986 F.2d 270, 274 (8th Cir. 1993) ("The government does not need to show that the defendant was in actual physical possession of the firearm, or that he brandished it or discharged it."); *United States* v. *Sykes*, 977 F.2d 1242, 1248 (8th Cir. 1992) ("It is inconsequential that the gun was located in a different room from where the drug transactions occurred."); *United States* v. *Drew*, 894 F.2d 965, 968 (8th Cir. 1990) ("the mere presence and ready availability of a firearm at a house where drugs [have been] dealt" is sufficient to support a 924(c) conviction); EIGHTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS (CRIMINAL) § 6.18.924, at 197-199 & n.9 (1994).

Section 924(c)'s "use" prong. The Court held that, to "use" a firearm within the meaning of Section 924(c), a person must "active[ly] employ[]" it by "brandishing, displaying, bartering, striking with, * * * firing or attempting to fire" the weapon. *Id.* at 508-509. The Court explicitly overruled those circuit court opinions, like the Eighth Circuit's, in which the only nexus required between a firearm and drugs was the "availability," "accessibility," or "proximity" of the firearm to the defendant during the predicate offense. *Id.* at 506, 508.

Because Hohn had neither "used" a firearm as this Court interpreted that term in *Bailey*, nor "carried" one, and hence was incarcerated for conduct that Section 924(c) does not criminalize, he moved to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The government conceded in its response to Hohn's Section 2255 motion that the jury instruction on firearm "use" contravened this Court's decision in *Bailey*. Pet. App. 23a. Nevertheless, the district court dismissed Hohn's petition because, in its view, Hohn had knowingly and intelligently "waived" his right to relief by failing to "raise his *Bailey* claim" on direct appeal, several years prior to the date on which *Bailey* was decided. Pet. App. 8a (citing *United States* v. *McKinney*, 79 F.3d 105, 109 (8th Cir. 1996)). In dismissing Hohn's Section 2255 motion, the district court neither explored the applicability of doctrines (such as cause and prejudice) under which a "waiver" (or procedural default) has traditionally been excused, nor examined the merits of Hohn's *Bailey* claim.

4. Hohn then applied to the Eighth Circuit for a certificate of appealability. Under Section 2253(c) of the recently enacted the AEDPA, federal and state prisoners who have received an adverse ruling on a Section 2254 or 2255 motion in district court must obtain a "certificate of appealability" as a precondition to appeal. 28 U.S.C. § 2253(c). A certificate

may issue only upon a "substantial showing of the denial of a constitutional right." *Id.* at § 2253(c)(2).

Over the vigorous dissent of Judge McMillian, the panel denied Hohn's request for a certificate of appealability. The majority explained that the AEDPA's requirement of a "substantial showing of the denial of a constitutional right" (*ibid.*) had not been satisfied because, in its view, "petitioner is not making a constitutional claim," but rather is "making a claim [*only*] to a federal statutory right." Pet. App. 1a-2a. In support of that proposition, the majority cited the fact that this Court in *Bailey* "did no more than interpret a statute." *Id.* at 2a. The majority rejected the argument that the Constitution forbids the government from incarcerating an individual for conduct that is not a crime. It reasoned: "The Constitution does not guarantee that judges will always be right." *Ibid.*

In dissent, Judge McMillian argued that Hohn's claim for relief from incarceration is clearly rooted in the Fifth Amendment's Due Process Clause. *Id.* at 5a-7a. He explained that the Due Process Clause forbids continued incarceration of a person based on a conviction for conduct that this Court has determined is not criminal. *Id.* at 5a. The panel majority, however, found unpersuasive the series of Supreme Court and appellate cases, cited by Judge McMillian, in which post-conviction relief routinely has been granted on the basis of subsequent interpretations narrowing the reach of substantive criminal law. *Id.* at 5a-6a.[2]

Hohn petitioned for rehearing, arguing that his claim was premised on a denial of his due process right not to be incarcerated for conduct that this Court has decided does not constitute

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[2] One month later, the Eighth Circuit decided *United States* v. *Apker*, 101 F.3d 75 (1996), addressing the same issue. Judge Henley wrote a concurrence to criticize the *Hohn* decision, which he acknowledged was binding, and to recommend that the Eighth Circuit consider taking *Apker* or *Hohn* for en banc review. *Id.* at 76.

a crime. See Pet. for Reh'g. at 7-9. He also challenged (*id.* at 13-15) the draconian "waiver" rule the district court had applied to bar his claim, pointing out that the decision on which the doctrine is based, *McKinney*, 79 F.3d at 109, has only tenuous support even in the Eighth Circuit: Chief Judge Arnold and Judges Hansen, Loken, McMillian, and Murphy all voted to rehear *McKinney* en banc. The court of appeals denied Hohn's petition for rehearing and suggestion for rehearing en banc on February 10, 1997. Pet. App. 21a. Judges Beam, Hansen, Loken, and McMillian all dissented from the denial of en banc rehearing.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION WHETHER A CERTIFICATE OF APPEALABILITY SHOULD ISSUE UPON A SECTION 2255 PETITIONER'S SUBSTANTIAL SHOWING THAT HE IS INCARCERATED FOR CONDUCT THIS COURT HAS HELD IS NOT A CRIME IS IMPORTANT AND RECURRING

A. The Proper Interpretation of Section 2253(c)'s Appealability Requirement of a "Substantial Showing of the Denial of a Constitutional Right" Is a Question of Great Importance and Will Affect Countless Cases

Section 2253(c)(2) of the AEDPA is the first limitation Congress has imposed on the availability of appellate review of federal prisoners' collateral challenges to their convictions under Section 2255 since that statute was adopted almost fifty years ago. The proper scope of this new limitation on appellate review is an important and recurring issue of federal law that will significantly affect the proper administration of justice in the federal courts.

It cannot seriously be disputed that the federal courts will frequently be required to interpret and apply Section 2253(c)(2). As this Court is well aware, innumerable Section 2255 petitions are filed every year. In every Section 2255 case in which relief is denied, the petitioner will have an incentive to take an appeal; and, under the AEDPA, no appeal will lie unless a certificate of appealability is issued. The question presented in this case — whether

Section 2253(c)'s reference to "constitutional rights" restricts the type of cases that may be appealed, and in particular forecloses an appeal such as petitioner's — therefore can be expected to arise with great regularity in the federal courts.

This Court often renders substantive law decisions narrowing the perceived reach of criminal statutes.[3] Each such decision calls into question the validity of hundreds of convictions premised on the lower courts' erroneously broad constructions.[4] Section 2255 motions are the primary avenue of relief for such wrongfully incarcerated persons. Literally hundreds of Section 2255 challenges have been filed as a consequence of this Court's decision in *Bailey* alone. Thus, the question whether Section 2253(c) forecloses appeal as an avenue of relief for persons who are incarcerated for engaging in lawful conduct, as the court below held, will arise often. The same question of appealability presented here also will arise in *all* unsuccessful collateral challenges premised on statutory grounds.

In addition to arising with great frequency, the proper meaning of Section 2253(c) is an issue of great importance. Limitation of appellate review in large numbers of federal post-conviction cases will substantially restrict its salutary and unifying effect, leading to intracircuit differences in how district courts resolve issues in Section 2255 cases. By the same token, a

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[3] See, *e.g.*, *Bailey*, 116 S. Ct. at 508; *Ratzlaf* v. *United States*, 510 U.S. 135 (1994) (requiring, for a conviction under 31 U.S.C. §§ 5322(a) and 5324(3), that "the jury had to find [defendant] knew the [cash transactions] structuring in which he engaged was unlawful" — an element of the crime several courts of appeals had not previously required); *McNally* v. *United States*, 483 U.S. 350 (1987) (rejecting the widely accepted interpretation in the courts of appeals of the mail-fraud statute, 18 U.S.C. §§ 1341, 1343, as prohibiting schemes to deprive citizens of their intangible right to the honest and loyal services of a public official).

[4] See, *e.g.*, *Criminal Use of Guns: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. (May 8, 1997), 1997 WL 10571065 (Statement of T. Hungar) ("As a result [of *Bailey*], countless convictions under Section 924(c) have been reversed or vacated * * *.") (citing cases); *DOJ Moves to Counter Impact of Ratzlaf*, 4 No. 2 DOJ ALERT 10 (Feb. 7, 1994) ("The ruling [of the Supreme Court in *Ratzlaf*] undermined an estimated 200 past corruption convictions based on mail fraud * * *.").

prohibition on appellate review will decrease the opportunies for error correction. For federal prisoners convicted of conduct this Court later determines is not a crime, the district court will be the first, last, and only forum for Section 2255 relief from incarceration.[5] If the district court fails to grant relief — as did the district court below, on a misguided "waiver" theory (see *infra*, Section II) — an individual convicted only of *lawful* conduct may languish in prison without recourse. The court of appeals' interpretation of Section 2253(c) similarly would preclude any appeal from the denial of "statutory" claims (however meritorious) that a prisoner's sentence exceeds the maximum permitted by law, or that the convicting court lacked personal or subject matter jurisdiction, notwithstanding that Section 2255 expressly authorizes (see 28 U.S.C. § 2255), and courts historically have granted (see *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 178 (1874); *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830)), habeas relief for such claims. Thus, the Eighth Circuit's interpretation of Section 2253(c) will, unless corrected, inflict on many federal prisoners a profound injustice.

B. The Eighth Circuit's Analysis is Incorrect

Section 2253(c)(2) requires that a Section 2255 petitioner make "a substantial showing of the denial of a constitutional right" as a prerequisite to appeal. The court below interpreted that requirement to bar appeal in cases involving an alleged violation of a "federal statutory right" — a category it deemed to include a prisoner's claim that he is incarcerated based on a conviction for conduct that is not criminal. The decision is patently incorrect for two reasons.

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[5] Although a federal prisoner may seek a writ of habeas corpus in the district of confinement pursuant to 18 U.S.C. § 2241, such relief is available only when Section 2255 is "inadequate or ineffective to test the legality of his detention" (28 U.S.C. § 2255) — a standard that is not often met, even when the Section 2255 court has incorrectly refused to grant relief. See LARRY W. YACKLE, POSTCONVICTION REMEDIES § 30, at 154 (1981).

First, it is difficult to conceive of a more egregious denial of the constitutional right to due process than incarceration for conduct that this Court has conclusively decided is not a crime. Hohn's claim therefore plainly falls within the scope of Section 2253(c). Second, even if the "statutory" label the court below attached to Hohn's claim were accurate, Section 2253(c) cannot properly be interpreted to bar his appeal. A reading of Section 2253(c) in context with other relevant provisions of the AEDPA makes apparent that Congress used the term "constitutional right" interchangeably with the term "federal right," and did not intend Section 2253(c) to sever the appeal rights of federal prisoners on their statutory claims.

1. The court below decided not to issue a certificate of appealability solely becuase it deemed Hohn's claim — that he is incarcerated for conduct this Court has determined to be lawful — to be "a claim to a federal statutory [rather than constitutional] right." Pet. App. 2a. That was plainly wrong. As Judge Posner has correctedly explained, "If you argue that Statute X does not make your act a crime, you are making a *statutory argument*, but in support of a *due process claim*." *Johnson* v. *United States*, 805 F.2d 1284, 1288 (7th Cir. 1987) (Posner, J.) (emphasis added). Hohn need not "claim" that the "using" provision of Section 924(c) does not prohibit the conduct of which he was convicted — this Court conclusively decided that point in *Bailey*. Instead, Hohn claims that *because* the Court has decided that the conduct of which he was convicted is not criminal, his continuing incarceration is unlawful. That claim is *constitutional* because "punishing a person for engaging in conduct that the polity has not made criminal" violates the constitutional guarantee against a deprivation of liberty without due process of law. *Ibid.*

a. *Bailey applies retroactively, making the conduct of which Hohn was convicted lawful.* This Court has held that decisions like *Bailey*, which narrow the construction lower courts have given to *substantive* criminal statutes (unlike most decisions creating new *procedural* rules, see, *e.g.*, *Teague* v. *Lane*, 489 U.S. 288 (1989)), are retroactive. See *Davis* v. *United States*, 417 U.S. 333, 346-347 (1974).[6] "There can be no room for doubt" that "conviction and punishment * * * for an act" the Court has subsequently determined "the law does not make criminal * * * 'inherently results in a complete miscarriage of justice'" and requires retroactive application of the clarifying judicial decision. *Ibid.* (citation omitted). See also *United States* v. *Johnson*, 457 U.S. 537, 550 (1982) ("[F]ull retroactivity [i]s a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place.").[7] Not surprisingly, in the year and a half since this Court issued its decision in *Bailey*, the lower courts uniformly have concluded that the decision must be applied retroactively to persons convicted prior to the Court's pronouncement. See, *e.g.*, *Bousley* v. *Brooks*, 97 F.3d 284 (8th Cir. 1996),

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[6] The Court has applied a different rule to "new constitutional rules of criminal procedure," generally barring their retroactive application on collateral review. *Teague* v. *Lane*, 489 U.S. 288, 310 (1989). Unlike substantive law changes, which reveal beyond doubt that a defendant has been wrongfully convicted of conduct that is not a crime, procedural law changes do not always implicate the accuracy of the conviction and sentence. Procedural law changes accordingly are retroactive only when they are so "fundamentally unfair" as to "seriously diminish[]" "the likelihood of an accurate conviction." *Id.* at 290. As the Court explained in *Teague*, few "components of basic due process" that are "so central to an accurate determination of innocence or guilt" have not yet emerged, and thus retroactive application of new procedural rules is rarely required. *Id.* at 313. In contrast, all substantive law determinations that the conduct of which a defendant was convicted is not criminal are "central to an accurate determination of innocence or guilt." See *United States* v. *McKie*, 73 F.3d 1149, 1152-1153 (D.C. Cir. 1996).

[7] This principle of retroactivity of decisions that narrow the perceived scope of a criminal prohibition is compelled by the common-sense proposition that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994).

pet. for cert. filed (U.S. Mar. 18, 1997) (No. 96-8516); *United States* v. *Cota-Loiaiza*, 936 F. Supp. 751, 753-754 (D. Colo. 1996) (listing cases).

b. *Incarceration for lawful conduct is a core violation of the constitutional right to Due Process of law.* The Due Process Clause commands that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. This Court has often recognized that there are two components to that clause. "Substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin* v. *California*, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). And "procedural due process" requires that "[w]hen government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner." *United States* v. *Salerno*, 481 U.S. 739, 746 (1987).

The government's continuing incarceration of Hohn for conduct this Court has concluded is not a crime violates both components of due process. It is difficult to imagine a right more fundamental or "implicit in the concept of ordered liberty" than the right of a person to be free from punishment for conduct that is not proscribed by any law. See *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."); *North Carolina* v. *Pearce*, 395 U.S. 711, 738 (1969) (Opinion of Black, J.); cf. *BMW* v. *Gore*, 116 S. Ct. 1589, 1598 & n. 19 (1996) (holding that a state does not have the power to punish an individual for lawful conduct). This Court already has held that it is beyond dispute that "conviction and punishment" of a person for an act that the Court later concluded is not criminal "inherently results in a complete

miscarriage of justice." *Davis*, 417 U.S. at 346-347. Several courts of appeals, in reliance on *Davis*, have recognized that continued incarceration for conduct this Court has declared not to be criminal is a violation of due process. See, *e.g.*, *id.*; *United States* v. *Loschiavo*, 531 F.2d 659, 666 (2d Cir. 1976); see also *Apker*, 101 F.3d at 76 (Henley, J., concurring).

Hohn's continuing incarceration violates the most basic of his procedural due process rights: the government has failed both to prove each element of his purported crime beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 363 (1970); *Jackson* v. *Virginia*, 443 U.S. 307, 315 (1979). The government has never offered any evidence, let alone proven, that Hohn "actively employed" or "carried" a firearm. Pet. App. 4a-5a (McMillian, J., dissenting).

2. Even if the lower court's dubious conclusion (Pet. App. 2a) that Hohn is claiming a denial of his "statutory" (rather than constitutional) rights were correct, the court nevertheless erred in holding that Congress had abolished all appeals of such "statutory" claims. Although Section 2253(c)(2) authorizes a certificate of appealability to be issued only upon a "substantial showing of the denial of a constitutional right," the statute must be read as a whole and in light of its legislative history. See *Robinson* v. *Shell Oil Co.*, 117 S. Ct. 843 (1997). Such a reading clarifies that this term encompasses substantial claims of denial of *statutory* rights. The lower court's holding to the contrary would radically truncate the availability of appellate review of Section 2255 petitions, relegating many federal prisoners to one solitary opportunity in the district court to have even the most meritorious statutory claims heard — a drastic change in the law that no evidence suggests Congress intended.

Congress used the terms "constitutional right" and "federal right" interchangeably in the AEDPA and appears to have regarded them as synonymous. Section 2253(c)(2) authorizes

appeal upon a "substantial showing of the denial of a *constitutional* right." (emphasis added). In another section of the amended statute, however, Congress referred to *precisely the same authorization to appeal* as requiring a "substantial showing of the denial of a *Federal* right." 28 U.S.C. § 2262(b)(3) (emphasis added).[8] Further, Sections 2254 and 2255 continue to authorize a writ of habeas corpus to be granted if a person is held "in violation of the Constitution *or laws* of the United States," thus expressly authorizing relief from incarceration that violates only statutory rights. 28 U.S.C. §§ 2254, 2255 (emphasis added).

The legislative history and an examination of the purposes of the statutory habeas scheme resolve the ambiguity created by the statute's inconsistent terms. *Cf. Robinson*, 117 S. Ct. at 848. Congress modeled the "certificate of appealability" requirement, which applies equally to state and federal prisoners, on the former requirement that state prisoners obtain a "certificate of probable cause" indicating that a prisoner's claims were sufficiently substantial to warrant apellate review. See H.R. REP. NO. 23, 104th Cong., 1st Sess. 9 (1995) ("The bill thus enacts the standard of *Barefoot* v. *Estelle*, 463 U.S. 880 (1983)"). In *Barefoot*, 463 U.S. 881, 893 n.4, this Court held that a state prisoner meets the prerequisites for a certificate of probable cause by making a "substantial showing of the denial of a *federal right*." *Id.* at 881 (emphasis added). Several courts of appeals have correctly concluded that the AEDPA was meant to codify the *Barefoot* "federal right" standard for entitlement to an appeal. See, *e.g.*, *Santana* v. *United States*, 98 F.3d 752, 757 (3d Cir. 1996), pet. for cert. filed (U.S. Mar. 19, 1997) (No. 96-1443).

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[8] That section provides that a stay of execution shall be issued in a capital case upon application by the prisoner to any court for habeas relief; but mandates that the stay "shall expire if * * * a State prisoner * * * fails to make a *substantial showing of the denial of a Federal right* or is denied relief in the district court or at any subsequent stage of review." 28 U.S.C. § 2262(b)(3) (emphasis added).

The *Barefoot* "federal right" standard did not preclude appeal of a claim based on a federal statutory right, as the court below contends the certificate of appealability standard should be interpreted to do. Instead, it merely ensured that, regardless from which source of law (Constitution, federal statute, treaty) a habeas claim derived, it would proceed to appeal only if it presented a question of substance. See *Barefoot*, 463 U.S. at 893 n.4, 894 (holding that a claim is appealable if it is "'debatable among jurists of reason'" or is not "squarely foreclosed by *statute, rule* or authoritative court decision") (emphasis added) (citation omitted). "Although virtually all habeas corpus petitions" by state prisoners — and hence appeals from their denial — "raise federal *constitutional* claims" (POSTCONVICTION REMEDIES, *supra*, § 91, at 360 (emphasis in original)), Section 2254 has always authorized state prisoners' claims that their incarceration violates the "Constitution or *laws or treaties* of the United States." 28 U.S.C. § 2254(a) (emphasis added). This Court recently recognized that a state prisoner's claim of a serious violation of federal *statutory* law can warrant federal habeas relief under the same circumstances as would a federal prisoner's statutory claim. See *Reed* v. *Farley*, 114 S. Ct. 2291, 2299-2300 (1994). See also POSTCONVICTION REMEDIES, *supra*, § 91, at 360-362. Nothing in *Barefoot* suggested an intent to bar state prisoners from appealing such claims.

Because the overwhelming majority of habeas petitions and appeals by state prisoners invoke constitutional rights (see *id.*), Congress appears to have assumed that the *Barefoot* requirement that petitioners make a substantial showing of denial of a "federal right" is synonymous with the requirement that they make such a showing of a "constitutional right."

Particularly in the context of *federal* Section 2255 motions for relief (which often assert violations of statutory rights), however, that characterization is incorrect.[9]

That Congress gave no thought to this difference in extending the certificate of probable cause requirement to federal prisoners is apparent. In its amendment of Federal Rule of Appellate Procedure 22 to provide procedures for the new certificate of appealability requirement, Congress referred *exclusively* to *State* prisoners' petitions for relief. The amended Rule suggests that *only* State prisoners are required to obtain certificates of appealability and provides judicial procedures for addressing only *State* prisoners' appeals. See Fed. R. App. P. 22(b).

The lower court's interpretation of Section 2253(c) as eliminating federal prisoners' right to appeal from denial of even highly meritorious statutory claims would severely undermine the purpose of the statutory collateral challenge scheme. Section 2255 is, "'[a]s a remedy, * * * intended to be as broad as [the common law remedy of] habeas corpus.'" *United States* v. *Hayman*, 342 U.S. 205, 217 (1952) (quoting Statement by Judicial Conference Committee on Habeas Corpus Procedures). We have found nothing in the legislative history of the AEDPA suggesting that Congress intended to change that by eliminating a critical appellate avenue of relief for all movants asserting statutory rights. Instead, it is plain that Congress intended the appealability requirement merely to eliminate *frivolous* appeals by federal prisoners, regardless whether they are based on statutory or constitutional rights — just as the certificate of probable cause requirement had eliminated frivolous appeals by state prisoners. See H.R. REP. NO. 23,

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[9] "[G]iven that federal criminal prosecutions involve far more federal non-constitutional law than do state prosecutions, in practice the inclusion of federal 'laws' is far more significant in the § 2255 setting." RICHARD H. FALLON, DANIEL J. MELTZER, DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1465 (4th ed. 1996).

supra, at 9 ("Since federal prisoners, like state prisoners, generate a high volume of meritless applications for collateral relief, it is appropriate to require that appeals of habeas corpus petitions meet a threshold probable cause standard before such an appeal will be heard by an appellate panel.").

The Eighth Circuit's view that Section 2253(c) should be read otherwise, to make district court decisions final for even the most important federal statutory Section 2255 claims "would produce silly" — and shocking — "results." LARRY W. YACKLE, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. 135, 146-147 n.43 (Fall 1996). Persons who are wrongfully incarcerated absent any statutory authority, like Hohn, may remain in prison without appropriate relief. This type of claim has historically been given the utmost solicitude, and indeed has roots in the earliest decisions of this Court granting habeas corpus relief. See, *e.g.*, *Ex Parte Lange*, 85 U.S. at 178 (habeas corpus is appropriate remedy where convicting court issued a punishment that exceeded its statutory authority). There is simply no reason why Congress would have singled out such "statutory" claims for a special burden under the AEDPA. See *Apker*, 101 F.3d at 76 (Henley, J., concurring) ("it is doubtful Congress intended in its 1996 habeas revisions to bar appeals of claims that a conviction violates federal law").

C. The Courts of Appeals Are Deeply Divided Over Whether Section 2253(c) Permits Appeal of Meritorious Federal Statutory Claims

"There is a difference of opinion" among the federal courts of appeal on the question presented here: "whether § 2253(c), which provides that a certificate of appealability may issue 'only if the applicant has made a substantial showing of the denial of a constitutional right,' modifies preexisting law, which defined the required showing as, a 'substantial showing of the

denial of [a] federal right.'" *Hunter* v. *Bailey*, 101 F.3d 1565, 1571 (11th Cir. 1996). "It is undecided" among the federal courts "whether Congress intended to change the standard, along with the name, for granting a certificate of appealability," thereby foreclosing appeals by persons who claim to be held in violation of federal statutory rights. *Santana*, 98 F.3d at 757.

The Ninth Circuit has concluded that the prerequisite showing of a "denial of a constitutional right" in Section 2253(c) is "more demanding" than the "federal right" standard this Court set forth in *Barefoot*. *Williams* v. *Calderon*, 83 F.3d 281, 286 (9th Cir. 1996). In contrast, the Second, Fifth, and Tenth Circuits have concluded that Congress intended to codify, and did not alter, the *Barefoot* "federal right" standard. See *Drinkard* v. *Johnson*, 97 F.3d 752, 756 (5th Cir. 1996), cert. denied, 117 S. Ct. 1114 (1997); *Reyes* v. *Keane*, 90 F.3d 676, 679-680 (2d Cir. 1996); *Lennox* v. *Evans*, 87 F.3d 431, 434 (10th Cir. 1996), cert. denied, 117 S. Ct. 746 (1997). Each of those circuits, however, appears to interpret that standard as foreclosing appeals of statutory claims. See *Drinkard*, 97 F.3d at 756; *Reyes*, 90 F.3d at 679-680; *Lennox*, 87 F.3d at 434. The Third Circuit has suggested an entirely different interpretation, directly at odds with the Eighth Circuit's decision in *Hohn*: that Congress' use of the term "constitutional right" is attributable to "imperfect draftsmanship," and that Section 2253(c) may properly be read to *permit* appeals of statutory claims. *Santana*, 98 F.3d at 757.

The Eighth Circuit's decision that the new "constitutional right" standard forecloses Hohn's claim that he is incarcerated for "using" a firearm in a manner this Court held in *Bailey* does not violate Section 924(c), also directly conflicts with *three* decisions by the Tenth Circuit granting certificates of appealability under Section 2253(c) to hear virtually identical post-*Bailey* claims. In each case, the Tenth Circuit granted a certificate to decide an appeal of a federal

prisoner's claim that he was incarcerated for conduct this Court had determined in *Bailey* not to constitute "using" a firearm within the meaning of 18 U.S.C. § 924(c). See *United States* v. *Gorecki*, No. 96-4092, 1997 WL 74 (10th Cir. Apr. 1, 1997), pet. for cert. filed (Apr. 18, 1997) (No. 96-8702); *United States* v. *David*, No. 96-1391, 1997 WL 26581 (10th Cir. Jan. 24, 1997); *United States* v. *Deases*, No. 96-3152, 1996 WL 557661 (10th Cir. Oct. 1, 1996), cert. denied, 117 S. Ct. 746 (1997)). Like the Eighth Circuit, the Tenth Circuit interprets Section 2253(c) as requiring "a colorable showing of [a] *constitutional* error." *Lennox*, 87 F.3d at 434 (emphasis added). The Tenth Circuit's decisions in *Gorecki*, *David*, and *Deases* make clear, however, that it rejects the Eighth Circuit's view that a claim of incarceration for "using" a firearm in a manner this Court held in *Bailey* to be lawful is not a substantial claim of "constitutional" error.[10]

The Eighth Circuit's crabbed view of the protections of the Due Process Clause also conflicts with decisions in the Seventh and Second Circuits, recognizing (in reliance on this Court's decision in *Davis* v. *United States*, *supra*) that a prisoner's claim that he is incarcerated for lawful conduct asserts a denial of the constitutional right to due process. See *Johnson*, 805 F.2d at 1288; *Loschiavo*, 531 F.2d at 666; see also *Apker*, 101 F.3d at 76 (Henley, J., concurring).[11]

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[10] It is evident from the fact that the Tenth Circuit has repeatedly interpreted Section 2253(c) to authorize certificates of appealability to hear such claims that this is the law of the Circuit, notwithstanding that the decisions are unpublished. This Court recently granted certiorari to resolve a conflict presented in part by an unpublished decision of a court of appeals denying a certificate of probable cause (the predecessor of the certificate of appealability) in a habeas challenge. See *Lynce* v. *Mathis*, 117 S. Ct. 891, 893 (1997).

[11] Notably, the decision below has stimulated substantial controversy even within the Eighth Circuit itself on the question of the standards for appealability of habeas claims. Judges Beam, Loken, Hansen and McMillian all voted to grant Hohn's petition for en banc review. And in *Apker*, a case presenting a post-*Bailey* challenge identical to Hohn's, Judge Henley wrote separately to criticize the majority decision in *Hohn*.

II. THE EIGHTH CIRCUIT'S NOVEL WAIVER DOCTRINE CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND IS INCOMPATIBLE WITH THIS COURT'S PROCEDURAL DEFAULT CASES

If the Court grants review to address the Eighth Circuit's construction of the AEDPA, it should also decide whether a Section 2255 movant's procedural default — failure to raise on direct appeal a legal challenge that at the time was squarely foreclosed by binding circuit precedent and had been uniformly rejected in other circuits — can be excused because of an intervening change in controlling precedent, which establishes that the underlying conduct does not constitute a crime. This Court's decisions establish that such procedurally defaulted claims may be raised in collateral review proceedings if the claimant establishes "cause and prejudice" or "actual innocence." In denying Hohn's Section 2255 motion, however, the district court made no mention of the cause-and-prejudice standard but instead applied a broad, categorical waiver rule announced by the Eighth Circuit in *United States* v. *McKinney*, 79 F.3d 105, pet. for cert. filed (U.S. Oct. 11, 1996) (No. 96-6348). Pet. App. 8a-9a.[12] Under the *McKinney* standard, a defendant can be deemed to have knowingly and intelligently "waived" a claim by failing to anticipate an unforeseeable change in binding circuit precedent. As we explain below, the Eighth Circuit's waiver rule is at odds with the decisions of other circuits and is patently inconsistent with the jurisprudence of this Court. Further review of this important issue of federal law is warranted.[13]

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[12] The magistrate judge who initially reviewed Hohn's Section 2255 motion noted that Hohn had not raised a *Bailey* claim on direct appeal but found that the cause-and-prejudice standard for procedurally defaulted claims was satisfied. Pet. App. 11a-12a. "Because *Bailey* was not decided at the time of the direct appeal," the magistrate judge explained, "there is adequate cause for defendant's failure to raise it"; furthermore, Hohn had established prejudice because his case appeared to fall "within the purview of *Bailey*." *Id.* at 12a.

[13] The court of appeals in this case did not reach the question of procedural default because it concluded that it was without jurisdiction to hear Hohn's appeal under the AEDPA. But because the district court denied Hohn's Section 2255 petition solely on the strength of the Eighth Circuit's waiver rule, and because Hohn presented the waiver argument to the court of appeals (see Pet. for Reh'g, at 5-7, 13-15), it is properly before this Court for decision. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (Court may review a question if it was "pressed or passed upon" in the court below).

A. The Eighth Circuit's Decision Conflicts With The Approach of Other Circuits

McKinney involved a defendant who had been convicted under 18 U.S.C. § 924(c) for "using" a firearm. After McKinney's trial and the filing of his opening brief on direct appeal, this Court decided *Bailey*. On the basis of these events, a panel of the Eighth Circuit held (in two sentences and without citation) that McKinney's failure to raise the *Bailey* argument at trial or in his initial appeal brief amounted to a "waive[r]" of the argument. *McKinney*, 79 F.3d at 109. Judge Heaney dissented, pointing out that "it would have been useless for McKinney to challenge the correctness of [the Eighth Circuit's] previous cases" before *Bailey* was decided. *Id.* at 109 (Heaney, J., dissenting). He added that "a waiver must be knowing and intentional" (*ibid.*) and that those requirements could not be satisfied when the "waived" argument was not available because this Court's decision had not yet been issued. The Eighth Circuit declined to rehear the case en banc, although five judges voted to do so. *Id.* at 105 n.*. In *Bousley* v. *Brooks*, 97 F.3d at 287-288, the Eighth Circuit applied the *McKinney* rule to a Section 2255 petitioner raising a *Bailey* claim.

The Eighth Circuit's waiver doctrine clearly conflicts with decisions of the Sixth, Seventh, and Tenth Circuits. *Mizen* v. *United States*, No. 96-3478, 1997 WL 117037, at **1 (6th Cir. Mar. 13, 1997); *Lee* v. *United States*, ___ F.3d ___, No. 96-3323, 1997 WL 213972, *2-*3 (7th Cir. Apr. 30, 1997); *United States* v. *Barnhardt*, 93 F.3d 706, 708-709 (10th Cir. 1996). The conflict is sharpest with *Barnhardt*, which held that a Section 2255 petitioner who failed to raise a *Bailey* argument (because he entered a guilty plea) was not precluded from

mounting a collateral attack on his Section 924(c) conviction. *Barnhardt*, 93 F.3d at 708-709. In *Bousley*, the Eighth Circuit, relying on the waiver doctrine announced in *McKinney*, expressly "declined to follow" *Barnhardt*'s holding. 97 F.3d at 288 n.4.

The rule of *McKinney* is also at odds with post-*Bailey* decisions of the Sixth and Seventh Circuits in cases involving collateral challenges to Section 924(c) convictions. In *Lee*, the Seventh Circuit, like the Tenth, rejected the government's argument that a defendant's guilty plea "conclusively establishe[d] the elements of the offense and the material facts necessary to support the conviction, foreclosing any challenge to the conviction." 1997 WL 213972, *2, (internal quotation marks omitted). The Seventh Circuit reasoned that, although the facts admitted in the guilty plea "at that time were thought to constitute a crime under § 924(c)," *Bailey* later held that those facts (amounting to simple possession of a gun) "do[] not a § 924(c) crime make." *Ibid.* The concept of waiver, the Seventh Circuit explained, was simply inapposite under these circumstances:

> [H]ow can Lee be held to have waived his right to challenge whether those facts constituted a crime when at the time they did, and after *Bailey* they may not? He *could not possibly be viewed as having voluntarily waived* what turns out to be a *Bailey* challenge when *Bailey* did not exist at the time he pled guilty.

Ibid. (emphasis added). The court of appeals also noted that the same reasoning applies whether the facts (which are later determined not to constitute a crime) were "found by a jury or admitted by a defendant." *Id.* at *3.

Similarly, the Sixth Circuit in *Mizen*, 1997 WL 117037, permitted a Section 2255 petition to raise a *Bailey* challenge that had been procedurally defaulted. Applying well-established principles, the Sixth Circuit explained that the defendant's failure to raise the *Bailey* issue on direct appeal required him to "demonstrate cause and actual prejudice to excuse his failure to

do so." 1997 WL 117037, at *1. The court then went on to hold that cause was established because "Mizen's § 924(c) [*Bailey*] claim relies on a significant, intervening change in the law." *Ibid.* The court also found prejudice because the evidence appeared insufficient to satisfy the *Bailey* standard. *Ibid.*

In cases raising similar claims following this Court's decision in *McNally*, the courts of appeals recognized that cause existed for failing to raise an issue that was not viable before an intervening decision of this Court changed the interpretation of the underlying statute. See, *e.g.*, *Callanan* v. *United States*, 881 F.2d 229, 231 (6th Cir. 1989) ("the fact that the point appeared to be settled constituted cause for not raising it"); *United States* v. *Shelton*, 848 F.2d 1485, 1490 (10th Cir. 1988) (*McNally* "presents the quintessential circumstance in which a defaulted claim had so little basis in existing law that a habeas petitioner had cause for failing to raise it"). Although other circuits have not directly decided the question in post-*Bailey* claims, no court of appeals has shown any predisposition to agree with the Eighth Circuit.[14] As we next explain, the Eighth Circuit's waiver rule is also in severe tension with established law concerning the cause-and-prejudice standard and the exception.

B. The Eighth Circuit's Waiver Rule Creates An End Run Around The Established Framework For Deciding Whether Collateral Relief Is Available for Procedurally Defaulted Claims

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[14] The Third, Fourth, and Ninth Circuits have all heard appeals (on other grounds) from district court orders that vacated convictions or guilty pleas after *Bailey*; not one of those courts suggested that waiver or procedural default posed any barrier to collateral relief based on *Bailey*. See, *e.g.*, *United States* v. *Davis*, ___ F.3d ___, No. 96-1721, 1997 WL 195397, *1 (3d Cir. Apr. 23, 1997); *United States* v. *Hillary*, 106 F.3d 1170, 1170-1171 (4th Cir. 1997); *United States* v. *Handa*, 110 F.3d 42, 43 (9th Cir. 1997). Two other circuits, the First and Fifth, have expressly reserved the question whether *Bailey* can be invoked in collateral challenges, but neither court suggested any inclination to agree with the Eighth Circuit's lonely view. See *United States* v. *Joseph*, 109 F.3d 34, 36 (1st Cir. 1997); *United States* v. *Rocha*, 109 F.3d 225, 229 n.5 (5th Cir. 1997); see also *United States* v. *Andrade*, 83 F.3d 729, 730 n.1 (5th Cir. 1996).

The Eighth Circuit's waiver rule is also incompatible with this Court's cases dealing with the "cause-and-prejudice" test for excusing procedural defaults. Under established principles, a prisoner who seeks collateral relief on a ground not raised at trial or on direct appeal from conviction is said to have suffered a "procedural default." See, *e.g.*, *United States* v. *Frady*, 456 U.S. 152, 168 (1982). But procedural default does not necessarily preclude collateral relief on the defaulted theory. This Court has established two exceptions that allow collateral review in spite of a procedural default: where the prisoner (1) can "demonstrate cause for the default and actual prejudice as a result" of the underlying error, or (2) can show "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman* v. *Thompson*, 501 U.S. 722, 750 (1991); see also *Frady*, 456 U.S. at 167-168. Although Hohn satisfies both exceptions and thus is entitled to relief on his procedurally defaulted *Bailey* claim, the Eighth Circuit's waiver rule denies him the benefit of these exceptions.

1. *Cause and Prejudice*. To demonstrate "cause, a claimaint must show "the existence of * * * some objective factor external to the defense [which] impeded counsel[]" and effectively prevented the defendant from raising the argument during trial. *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986). The fact that an argument is precluded by binding precedent (and is sufficiently novel that it appears frivolous) is just such an objective, external factor that excuses counsel's failure to raise the issue.[15]

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[15] As we show below (see Section III), Hohn was obviously prejudiced by the trial court's error because he was convicted under § 924(c) for conduct that does not constitute a crime after *Bailey*. See *Callanan*, 881 F.2d at 231 ("[t]he prejudice requirement boils down to a question of whether the Callanans could properly have been convicted" under the proper standard); *Dalton* v. *United States*, 862 F.2d 1307, 1310 (8th Cir. 1988) (prejudice requires showing that prisoner "was convicted for conduct that is not proscribed by the [relevant] statute").

This Court has specifically held that where a claim "is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim." *Reed* v. *Ross*, 468 U.S. 1, 16 (1984). In *Reed*, the Court categorized the kinds of novel claims that might establish cause, identifying two categories that "[b]y definition" demonstrate cause because there was no reasonable basis for raising the claim earlier:

> First, a decision of this Court may explicitly overrule one of [its own] precedents. Second, a decision may overturn a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.

Id. at 17 (internal citations and quotation marks omitted). The *Bailey* argument, on which Hohn here relies, falls squarely within the second category. In 1992, when Hohn was tried and convicted under Section 924(c), the Eighth Circuit (like every other circuit) had construed the term "use" quite broadly (and erroneously, as it turned out). Hohn's trial counsel cannot be faulted for lacking the prescience to believe that a decision of this Court some three years after his conviction would fundamentally alter the landscape of Section 924(c)(1).

The Sixth Circuit, like the magistrate judge in this case (Pet. App. 12a), has recognized that *Bailey*'s substantial change in the substantive interpretation of Section 924(c)(1) constitutes cause. *Mizen*, 1997 WL 117037, at **1 ("Mizen's § 924(c) [*Bailey*] claim relies on a significant, intervening change in the law"). Moreover, the courts of appeals recognized that this Court's decision in *McNally* — a case that, like *Bailey*, narrowed the scope of a criminal statute — provided cause for failing to raise the identical issue on direct appeal. See, *e.g.*,

Callanan, 881 F.2d at 231; *Shelton*, 848 F.2d at 1490.[16] Where cause and prejudice exist, as they do here, procedural default is excused.

2. *Miscarriage of Justice*. This Court has permitted the assertion of procedurally defaulted claims in order to avoid a "miscarriage of justice" or where a claim asserts "actual innocence." *Sawyer* v. *Whitley*, 505 U.S. 333, 339 (1992).[17] In a collateral review case involving a similar claim, this Court has noted that "conviction and punishment [] for an act that the law does not make criminal * * * inherently results in a complete miscarriage of justice * * * ." *Davis* v. *United States*, 417 U.S. 333, 346 (1974) (internal quotation marks omitted).[18] The courts of appeals have likewise recognized that a claim such as Hohn's -- pointing to a later decision of this Court that demonstrates the prisoner has been convicted for conduct that is not criminal -- shows that there has been a miscarriage of justice and obviates any need to show cause for the default. See, *e.g.*, *Shelton*, 848 F.2d at 1490 n.4 (recognizing "a compelling argument [that a *McNally* claim is available on collateral review] without regard for whether the petitioner had cause for any default"); *Callanan*, 881 F.2d at 231 ("There is a strong argument * * * that cause need not be shown at all in these unusual circumstances.") (citing *Shelton*); see

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[16] In *Dalton*, the Eighth Circuit correctly applied the cause-and-prejudice test in holding that a defendant challenging his conviction for mail fraud after *McNally* was not precluded from obtaining relief because of procedural default. See *Dalton*, 862 F.2d at 1310 (stating that "a petitioner for post-conviction relief has cause * * * for failing to raise a claim 'for which there was no reasonable basis in existing law'") (quoting *Reed*, 468 U.S. at 15). The Court in *McKinney* did not cite or distinguish *Dalton*. In this case, the Eighth Circuit was asked to grant rehearing en banc in part to resolve the tension between *Dalton* and *McKinney*, but declined to do so.

[17] Although *Sawyer* addressed the "miscarriage of justice" exception in the context of successive claims, the Court noted that the same standard also applies to allow consideration of the merits of procedurally defaulted claims. *Ibid.* (citing *Murray*, 477 U.S. at 496).

[18] *Davis* itself did not involve a procedural default, but the Court there expressed unshakeable certainty ("[t]here can be no room for doubt," *ibid.*) that conviction for conduct that is not a crime constitutes a miscarriage of justice.

also *United States* v. *McKie*, 73 F.3d 1149, 1154 (D.C. Cir. 1996) (remanding to determine whether § 2254 movant was actually innocent under new interpretation of criminal statute); *United States* v. *Sood*, 969 F.2d 774, 776 (9th Cir. 1992) ("The doors of collateral review are open for petitioners who can show, through an intervening change in the law, that they could not have committed the substantive offense with which they were charged," reviewing cases applying *McNally*). Because Hohn is actually innocent of the crime defined by Section 924(c), the actual innocence exception should excuse his procedural default. See also Section III, *infra*.[19]

The Eighth Circuit's waiver doctrine eviscerates these well-established exceptions to procedural default and denies Hohn the opportunity for collateral review that he is properly entitled to.

C. The Issue Is Important And The Eighth Circuit's Analysis Is Seriously Flawed

The Eighth Circuit's novel waiver rule raises an important issue of federal law that warrants this Court's attention. At the same time, the Eighth Circuit's rule is erroneous and in need of correction by this Court. For those reasons as well, review should be granted.

The Eighth Circuit's waiver doctrine is important for at least four reasons. First, it arises with great regularity. Second, it threatens to undermine the scheme that this Court has established for evaluating procedural defaults. Third, the Eighth Circuit's waiver rule leads to

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[19] We note, moreover, that many cases decided in the wake of *McNally* and *Bailey* have recognized, without engaging in a specific analysis of cause or actual innocence, that an intervening change in the interpretation of the underlying criminal statute is a proper ground for collateral relief. See, *e.g.*, *Lee*, 1997 WL 213972, at *2-*3; *Barnhardt*, 93 F.3d at 709; *Ingber* v. *Enzor*, 841 F.2d 450, 454 (2d Cir. 1988) ("retroactive application [of *McNally*] is necessary to avoid an unfair result"); *Magnuson* v. *United States*, 861 F.2d 166, 167 (7th Cir. 1988).

untenable results, permitting federal prisoners to languish in federal prisons for conduct that this Court has held is not criminal. And fourth, the Eighth Circuit's rule would effectively require defendants to raise claims that are admittedly frivolous, merely to preserve arguments for collateral review in the hope that the substantive law might later be interpreted more narrowly. Besides the sheer impossibility of that task, such a requirement would multiply the number of frivolous issues in criminal cases, needlessly burdening the limited resources of federal courts and serving no useful purpose. This Court has (without dissent) rejected a requirement that a defendant "make a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." *Johnson* v. *United States*, No. 96-203, slip op. 6-7 (U.S. May 12, 1997). Indeed, such a requirement would directly conflict with counsel's obligation *not* to advance frivolous arguments before the court. See, *e.g.*, *United States* v. *Gomez*, 24 F.3d 924, 926 (7th Cir. 1994).

The Eighth Circuit's waiver rule is also egregiously incorrect. As Judge Heaney correctly noted, "a waiver must be knowing and intentional." *McKinney*, 79 F.3d at 109 (Heaney, J., dissenting). A defendant who does not know (and cannot reasonably predict) that this Court will issue a ground-breaking decision three years after his conviction cannot be said to have waived an argument that was foreclosed before that decision. The Seventh Circuit has made much the same point, recognizing that a defendant "could not possibly be viewed as having *voluntarily* waived" an argument that "did not exist at the time he pled guilty." *Lee*, 1997 WL 213972, at *2 (emphasis added). Similarly, the Ninth Circuit pointed out that a pre-*Bailey* guilty plea was not "knowing and voluntary" in the light of *Bailey* because "the facts [the defendant] admitted committing do not now constitute a crime." *United States* v. *McJoy*, No.

95-15565, 1996 WL 528422, **1 (9th Cir. Sept. 13, 1996); see also *id.* at **2 (noting "fundamental unfairness of allowing the government to keep the benefit of a bargain McJoy did not contemplate").

III. THE PROPER DEFINITION OF THE CRIME OF "CARR[YING] A FIREARM" UNDER 18 U.S.C. § 924(C) IS AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW THAT WOULD BENEFIT FROM CLARIFICATION BY THIS COURT

If this Court concludes that review should be granted on the first two questions presented, then it should also grant review to address the government's contention below (replayed in countless post-*Bailey* cases across the country) that petitioner's conviction under 18 U.S.C. § 924(c) can be sustained because he "carrie[d] a firearm." As we explain below, the proper scope of "carrying" liability under Section 924(c) is a critically important question of federal law as to which the courts of appeals are in disarray. Although the lower courts did not reach the "carry" issue, it was properly raised below and is therefore presented for decision. See note 12, *supra*. Moreover, resolution of the issue is not dependent upon any factual findings but rather on an analysis of the text, structure, and legislative history of the statute as well as on very limited materials from the record (such as the jury instructions and limited portions of the trial testimony).[20] As we explain below, the government completely failed to prove that petitioner "carried" a firearm, much less that he carried it "during" the predicate offense. And,

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[20] The government acknowledged in the district court that petitioner's challenge to his Section 924(c) conviction raises "an issue of law" that "can be resolved on the basis of the record and files before the Court." Pet. App. 15a.

at a minimum, petitioner is entitled to a new trial because the jury instructions plainly misstated the proper scope of "carrying" liability.[21]

A. The Scope of "Carrying" Liability Is An Important And Recurring Issue

Section 924(c) is one of the most frequently deployed criminal provisions in the federal prosecutor's arsenal. According to data collected by the U.S. Sentencing Commission, in the fiscal year ending September 30, 1995 alone, 1,973 defendants were sentenced for violations of Section 924(c)(1). MURRAY, *Mandatory 5-year Sentence for Gun Use Curbed By Court*, Wash. Times, Dec. 7, 1995, at A6. Moreover, since this Court's decision in *Bailey*, which worked a substantial narrowing of the scope of "use" liability under Section 924(c), the federal courts increasingly have been called upon to determine the nature of alternative liability under Section 924(c) for "carr[ying] a firearm." See *United States* v. *Cooke*, No. 96-1852, 1997 U.S. App. LEXIS 6645, at *16 n.7 (7th Cir. April 9, 1997) ("[N]ow that the *Bailey* decision has dramatically constricted the range of conduct constituting 'use' of a firearm, delineation of the parameters of the term 'carries' takes on heightened significance"). In the year and a half since *Bailey* was decided, there have been literally hundreds of reported decisions by the district courts and courts of appeals discussing this subject. Not surprisingly, the Solicitor General has acknowledged that Section 924(c) "is an important and widely used statute." No. 95-1605 Petition for Certiorari, *United States* v. *Gonzales*, at 7. The scope of criminal liability under

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[21] Because one of the two alternative theories of Section 924(c) liability has (as the government concedes) been rendered legally invalid by *Bailey*, Hohn is entitled to have the verdict set aside. As the Eighth Circuit has explained, "a verdict based on jury instructions that provided alternative bases for a finding, one of which is legally inadequate, is presumed to have rested on the insufficient basis." *United States* v. *Ryan*, 41 F.3d 361, 365 (1994) (citing *Griffin* v. *United States*, 502 U.S. 46 (1991)). The jury in this case was not asked to specify on the verdict form whether Hohn "used" or "carried" a firearm. It is therefore impossible to determine from the record on which ground the jury based the conviction (*Stromberg* v. *California*, 283 U.S. 359, 368 (1931)), and the verdict must be set aside if either ground is improper.

Section 924(c) is especially important, moreover, because of the severe penalties that Congress has attached to it.

B. The Courts Of Appeal Are In Disarray Over What It Means To "Carry" A Firearm And Would Benefit From Guidance From This Court

As the Seventh Circuit recently noted, "[t]he circuits are split" in cases involving firearms found in vehicles over what it means to "carry" a firearm under Section 924(c). *Cooke*, 1997 U.S. App. LEXIS 6645, at *25. There is a sharp conflict over "whether a weapon that is aboard * * * must be immediately accessible to the defendant in order to suppport a 'carrying' conviction." *Ibid.* Accord *United States* v. *Cleveland*, 106 F.3d 1056, 1065, 1066-68 (1st Cir. 1997) (noting 4-3 circuit split on this issue), pet. for cert. filed, Apr. 30, 1997 (No. 96-8837).[22] The First, Fourth, and Tenth Circuits have all held that "a gun may be 'carried' in a vehicle for purposes of § 924(c)(1) without necessarily being immediately accessible to the defendant while it is being transported." *Cleveland*, 106 F.3d at 1066; see *United States* v. *Miller*, 84 F.3d 1244, 1259 (10th Cir.), cert. denied, 117 S. Ct. 443 (1996); *United States* v. *Mitchell*, 104 F.3d 649, 653-54 (4th Cir. 1997). In contrast, the Second, Sixth and Ninth Circuits have held that a gun may be carried in a vehicle only if it is immediately accessible to the defendant. See *United States* v. *Giraldo*, 80 F.3d 667, 677-78 (2d Cir.), cert. denied, 117 S. Ct. 135 (1996); *United States* v. *Riasco-Suarez*, 73 F.3d 616, 623 (6th Cir.), cert. denied, 117 S. Ct. 136 (1996); *United States* v. *Staples*, 85 F.3d 461, 464 (9th Cir.), cert. denied, 117 S. Ct. 318 (1996). The dissenting judges in the D.C. Circuit's *en banc* court in *Bailey*, whose interpretation of "use" was adopted by this Court, were of the view that "carry" does *not* extend

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[22] See also No. 96-8837 Petition for Certiorari, *Cleveland* v. *United States*, at 7-17 (describing conflict); No. 96-1654 Petition for Certiorari, *Muscarello* v. *United States*, at 6-11 (filed April 18, 1997) (same).

to cases where a firearm that is not immediately accessible to the defendant is transported in a vehicle. See 36 F.3d 106, 125 (D.C. Cir. 1994) (Williams, joined by Silberman & Buckley, JJ., dissenting) ("The effect would be to have § 924(c) embrace virtually every instance where a drug trafficker transports a weapon; in view of Congress's provision of a separate penalty in an adjacent section for anyone who "transports" a weapon * * * , 18 U.S.C. § 924(b), that seems an improbable duplication."), rev'd, 116 S. Ct. 501 (1995). At least one commentator has noted this "split among the circuit courts." KESSELMAN, *Firearm Possession: Excuse Me, Are You "Using" That Gun? The United States Supreme Court Examines 18 U.S.C. 924(c)(1) in Bailey v. United States*, 30 CREIGHTON L. REV. 513, 540 (1997). Thus the courts of appeal are sharply divided on the question whether *immediate accessibility* is a *necessary* prerequisite to "carrying."

Although the circuits are hopelessly confused over the meaning of "carry" in vehicle cases, we are aware of no circuit decision since *Bailey* that has held that a defendant "carries a firearm" merely by having it nearby or accessible in a house, apartment or other stationary setting (*i.e.*, not in a moving vehicle). Two circuits have expressly concluded that "carrying" does not cover such a scenario. Thus, the Seventh Circuit in *Cooke* recently held that immediate accessibility to a firearm does *not* suffice to show "carrying" in a nonvehicle case (where the firearm is not transported). 1997 U.S. App. LEXIS 6645, at *22-*25 (7th Cir. April 9, 1997) (defendant's presence in passenger compartment of pickup truck at same time garment bag containing firearm was on truck's bed did not constitute "carrying," where "the truck never moved the weapon"); accord *United States* v. *Jackson*, 103 F.3d 561, 569 (7th Cir. 1996). Similarly, the Sixth Circuit vacated a Section 924(c) where the defendant had been apprehended

while sleeping in his bedroom (with four guns "strewn about the bedroom"). *United States* v. *Moore*, 76 F.2d 111, 113 (6th Cir. 1996). The Sixth Circuit explained that "[i]mmediate availability is * * * a necessary, *but not sufficient*, determinant" of liability for carrying, and noted that "if Congress had meant Section 924(c)(1) to implicate any individual who happens to be within arm's reach of a firearm, surely it would have selected a more accurate term than 'carry.'" *Ibid.* (emphasis added).[23] Nevertheless, at least one district court has accepted this untenably broad definition of "carry," see also *United States* v. *Canady*, 920 F. Supp. 402, 405-408 (W.D.N.Y. 1996), and the government can be counted on to press that theory in other cases. Under these circumstances, further guidance from this Court would be tremendously valuable to the lower courts.

C. The Government Failed To Prove That Petitioner "Use[d] or Carrie[d] A Firearm"

As we explain below, there was no evidence — none — that Hohn ever "used" a firearm as that term was explained in *Bailey* v. *United States*, 116 S. Ct. 501 (1995). Nor did the government offer any evidence that would prove that Hohn "carried" the weapon "during and in relation" to the predicate offense.

1. *"Use" Liability*. The evidence supporting Hohn's § 924(c) conviction was succinctly summarized by Judge McMillian in his dissent from the panel opinion. He explained that police found firearms in the kitchen and bedroom, but not in the living room, where Hohn was arrested. Pet. App. 3a (McMillian, J., dissenting). At trial, a government witness, Cindy

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[23] The handful of pre-*Bailey* decisions that endorsed such an expansive concept of "carrying" (see *United States* v. *Evans*, 888 F.2d 891, 895 (D.C. Cir. 1989), cert. denied, 494 U.S. 1019 (1990); *United States* v. *Anderson*, 881 F.2d 1128, 1140-41 (D.C. Cir. 1989); *United States* v. *Stewart*, 779 F.2d 538 (9th Cir. 1985)) have been effectively overruled by this Court's rejection, in *Bailey*, of the government's "possession for protection" theory of "use."

Vandry, testified that she had twice purchased methamphetamine from Hohn in his house. *Ibid.* She admitted that on those occasions she had observed "the rifles in the gun case but no handguns." *Id.* at 5a. Testifying in his own defense, Hohn "admitted possession of some of the methamphetamine, admitted he owned the firearms as an avid gunsmith and hunter, [and] disputed the police version of the location of some of the firearms * * * ." *Id.* at 3a.

In *Bailey*, this Court held that, to "use" a firearm within the meaning of Section 924(c), a person must "active[ly] employ[]" it by "brandishing, displaying, bartering, striking with, * * * firing or attempting to fire" the weapon. 116 S. Ct. at 508-509. In so holding, the Court rejected the government's argument that mere possession of a firearm for intended or potential use during a predicate offense qualifies as "use." In this case, there was simply no evidence that Hohn brandished, displayed, fired, pointed, or otherwise actively employed any of the firearms found in his home "during and in relation to" the predicate offense of possession of methamphetamine with intent to distribute it. Indeed, in opposition to Hohn's 2255 motion, the government did not argue that there was any evidence that Hohn "used" the firearms found in his home. Instead, it argued that there was sufficient evidence that Hohn *carried* a firearm. In short, the government failed completely to prove that Hohn committed the crime of "us[ing]" a firearm under Section 924(c).[24]

2. *"Carrying" Liability*. The government also failed to prove that Hohn "carrie[d]" a firearm. As we explain below, the text, structure, and legislative history of Section 924(c) all demonstrate that the crime of "carrying" a firearm occurs only when a defendant *has or bears*

[24] The government conceded, moreover, that the jury instruction on "use" was erroneous under *Bailey*. Pet. App. 16a. It further "agree[d] that it would be *plain error* had the instructions only given the jury the option of convicting the defendant under the 'use' prong of 18 U.S.C. 924(c), and the evidence only supported that option." Pet. App. 17a (emphasis added).

a weapon on his person. There is no evidence in this case, however, that Hohn "carried" any of the firearms found in his home, and certainly no evidence that he carried them "during" as well as "in relation to" the predicate possessory offense of possession of methamphetamine with intent to distribute it. The government accordingly failed to prove the crime of "carrying" a firearm in a predicate offense under Section 924(c) beyond a reasonable doubt, and Hohn is entitled to be have his sentence vacated.

As this Court has explained, the operative language of Section 924(c) "must be given its 'ordinary or natural' meaning." *Bailey*, 116 S. Ct. at 506 (quoting *Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993)). The ordinary meaning of the word "carry" — especially when used in conjunction with the direct object "firearm" or "weapon" — is to *have or bear on one's person*. This meaning is amply confirmed by standard dictionaries. See, *e.g.*, WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 233 (1988) (defining "carry" as "[t]o have or keep on one's person (*carry a gun*)") (emphasis altered); BLACK'S LAW DICTIONARY 194 (5th ed. 1981) (defining "carry" as "[t]o have or bear upon one's person, as a watch or weapon; locomotion not being essential."); *ibid.* (defining "carry arms or weapon" as "[t]o wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person."). Accord *Cleveland*, 106 F.3d at 1067 (acknowledging that the *"Black's* definition of 'carry arms or weapons' limits 'carrying' to the defendant's person" but declining to adopt that definition). Ordinary experience confirms that to carry a firearm mean to have or bear it on one's person. If asked the question, "Are you carrying a firearm?", an ordinary speaker of the English language would not answer "yes" unless he had a firearm on his person.

The government's answer to Hohn's Section 2255 petition in the district court suggests that it too understands the phrase "carries a firearm" according to its ordinary meaning. The government there argued:

> Evidence was presented to the jury that Hohn carried a firearm. * * * It is true that Hohn *did not have a firearm on his person* when the Omaha Police * * * execut[ed] [the] search warrant. However, a reasonable inference can be drawn from the evidence that Hohn was carrying a firearm *prior* to the officers' entry based upon the items that were located, i.e., drugs, guns and ammunition, and where they were located. * * * The .380 caliber semi-automatic pistol and the Colt revolver found on the kitchen counter within arms reach of the methamphetamine, packaged for redistribution, were found in holsters. The obvious inference to be drawn from this evidence is that Hohn, at some time prior to the execution of the search warrant, *entered his residence and placed his belongings, which included the methamphetamine and firearms*, onto the counter. Therefore, at some point prior to the execution of the search warrant, he obviously *carried the firearms* during his drug trafficking activities.

Pet. App. 17a-19a (emphasis added). As the highlighted language makes clear, even the government understands that to "carry a firearm" is to bear it upon one's person.

The ordinary meaning of the phrase "carries a firearm" is further confirmed by the structure and legislative history of Section 924. Section 924(a)(5)(B)(ii) penalizes the sale, delivery, or other transfer of a handgun or ammunition by an adult to a juvenile if the adult knows or has reasonable cause to know that the juvenile "intended to *carry or otherwise possess* or *discharge or otherwise use* the handgun or ammunition in the commission of a crime of violence." 18 U.S.C. § 924(a)(5)(B)(ii) (emphasis added). This provision reflects Congress's understanding of "carrying" as a specific kind of possession (bearing on one's person). In addition, Section 924(b) makes it a separate crime to "transport" a firearm with the knowledge or "intent to commit therewith an offense punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 924(b). Thus Congress plainly knows how to reach situations where a firearm is caused to be moved by a defendant in a vehicle. Had Congress thought such conduct

was already encompassed within "carrying" liability, there would have been no need to enact Section 924(b).

What is more, every reference to "carrying" a firearm in the legislative history of Section 924(c) of which we are aware is fully consistent with the ordinary meaning of that term. See, *e.g.*, S. Rep. No. 225, at 314 n.10, 1984 U.S.C.C.A.N. at 3492 n.10 ("Evidence that the defendant had a gun *in his pocket* but did not display it, or refer to it, could nevertheless *support a conviction for "carrying"* a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape.") (citation omitted) (emphasis added).

Moreover, this Court's unanimous decision in *Bailey* strongly confirms that "carrying" a firearm encompasses only bearing the weapon on one's person. Tellingly, the Court in *Bailey* said: "Under the interpretation we enunciate today, a firearm can be used *without being carried*, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm *without handling it*; and a firearm can be carried without being used, *e.g.*, when an offender *keeps a gun hidden in his clothing* throughout a drug transaction." *Bailey*, 116 S. Ct. at 507 (emphasis added). As the highlighted language makes clear, this Court in *Bailey* had in mind the ordinary meaning of "carrying"; and the opinion's clear intimation that a firearm that is bartered for drugs would not be carried *if it is not handled*, confirms that having a firearm in one's hands or one's person is a necessary precondition to carrying it. Also significant is this Court's rejection in *Bailey* of the government's contention that there could be liability under Section 924(c) merely by virtue of a defendant's "placement of a firearm to provide a sense of security or to embolden." 116 S. Ct. at 508. The Court explained:

> It follows, according to this argument, that a gun placed in a closet is "used," because its mere presence emboldens or protects its owner. We disagree. Under this argument, *mere possession of a firearm by a drug offender, at or near the site of a drug crime or its proceeds or paraphernalia, is a "use"* by the offender, because its availability for intimidation, attack, or defense would always, presumably, embolden or comfort the offender. But the mere inert presence of a firearm, without more, is not enough to trigger § 924(c)(1). Perhaps the nonactive nature of this asserted "use" is clearer if a synonym is used: storage. A defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds. Storage of a fiream, without its more active employment, is not reasonably distinguishable from possession.

Ibid. (emphasis added). Although the foregoing discussion was directed at "use" liability, there is no reason why a similarly broad reading of "carrying" liability — to include mere possession of a firearm in proximity to drugs — would "be reasonably distinguishable from possession" either.

Finally, even if the Court were to conclude that the language, structure, and legislative history of Section 924(c)(1) do not compel the interpretation of "carry" suggested above, there can be no serious doubt that our interpretation is a reasonable one, and that the statute is therefore *at least* ambiguous on this score. Under the rule of lenity, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) (citing *Bell* v. *United States*, 349 U.S. 81, 83 (1955)). That principle is dispositive here.

In sum, the crime of "carrying" a firearm under Section 924(c) requires that a defendant bear the weapon on his person. There was no evidence in this case that Hohn "carried" the firearms in this sense, much less that he carried them "during" the predicate possessory offense. Although the government argued below that a fair inference of such conduct could have been drawn from the facts, that submission was simply incorrect. There was no evidence presented that Hohn ever carried the firearms located in his kitchen and in his bedroom drawers. In any

event, even if there were proof of carrying at some time by Hohn, there was no proof (much less proof beyond a reasonable doubt) that Hohn carried the firearms *during* the predicate offense. See *United States* v. *Harrison*, 103 F.3d 986, 990-92 (D.C. Cir. 1997). For all we know, any carrying that occurred could well have preceded Hohn's coming into possession of the methamphetamine he was charged with possessing with intent to distribute. If so, then Hohn plainly did not violate Section 924(c) — under any view of the evidence.

D. Because The Jury Instruction Grossly Misstated The Law, Petitioner Is Entitled, At A Minimum, To A New Trial

As previously explained, Hohn is entitled to have his conviction set aside on the Section 924(c) count because of this Court's decision in *Bailey*. But even if that were not the case, and the government had presented sufficient evidence from which the jury could conclude beyond a reasonable doubt that Hohn "carried" a firearm in violation of Section 924(c), he would be entitled to a new trial because of fundamental defects in the jury instructions. The jury was charged that

> [t]he phrase "used a firearm" means having a firearm *available to aid in the commission* of possession of Methamphetamine with intent to distribute. *Similarly*, the phrase "carried a firearm" *does not require proof of actual possession* of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was *available to provide protection* in connection with the possession of Methamphetamine with intent to distribute or facilitate success.

Pet. App. 31a (emphasis added). As previously noted (at note 23, *supra*), the government acknowledged that the part of the charge relating to firearm "use" was erroneous and would have qualified as "plain error" if use were the only basis for liability charged to the jury.

The jury's instruction on the meaning of "carrying" liability, however, suffers from the same flaw as the "use" instruction. Indeed, "use" and "carry" are defined in the Eighth

Circuit's model instruction in a virtually identical fashion: both permit a finding of liability based solely on whether the firearm is "available" to assist the defendant during the predicate act. That theory of liability, however, was categorically rejected by this Court in *Bailey*. See 116 S. Ct. at 508 (explaining that government's "possession for protection" theory "is not reasonably distinguishable from possession," which Section 924(c) does not reach). Nor does the Eighth Circuit's instruction for "carrying" even remotely resemble the ordinary meaning of that term, when used in conjunction with weapons. Hohn could easily have "carried" the firearms within the meaning of the Eighth Circuit's instruction without bearing them on his person, without transporting them within immediate reach in a vehicle, and even without transporting them in an inaccessible place in a vehicle.[25] Indeed, the jury instruction did not even require a finding that Hohn *posessed* the firearms for a finding of "carrying." At a minimum, petitioner is entitled to a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ALAN UNTEREINER
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MAY 1997

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[25] The government's suggestion that the jury could properly have found that Hohn carried the firearms by bearing them on his person at some previous point in time (but still during his predicate possessory offense) is wrong not only because there was no evidence to support such a finding, but also because the jury instruction failed completely to present that issue for the jury's determination.

APPENDICES

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 96-3118

Arnold F. Hohn, *

Appellant, *

v. * Appeal from the United States District Court for the District of Nebraska.

United States of America, *

Appellee. * (PUBLISHED)

Submitted: September 13, 1996

Filed: November 4, 1996

Before McMILLIAN, MAGILL, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

The petitioner in this case, unsuccessful in his effort to have his sentence set aside under 28 U.S.C. § 2255, seeks review in this court. Petitioner's appeal, however, will not lie unless we issue him a certificate of appealability, and such a certificate is not available unless the petitioner makes a "substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2).

The petitioner complained to the district court that at his trial the jury instructions dealing with what it means to use a firearm under 18 U.S.C. § 924(c)(1) did not conform to the principles outlined in Bailey v. United States, 116 S. Ct. 501 (1995). It seems to us that under these circumstances a certificate cannot issue, because the petitioner is not making a

constitutional claim: He is making a claim to a federal statutory right. Bailey did no more than interpret a statute, and an incorrect application of a statute by a district court, or any other court, does not violate the Constitution. The Constitution does not guarantee that judges will always be right. It does guarantee, it is true, that persons accused of crimes will receive due process; but the petitioner makes no due process claim with respect to the trial judge's actions, and trial errors hardly ever rise to the level of a due process violation in any case.

United States v. Liguori, 438 F.2d 663 (2d Cir. 1971), on which Judge McMillian relies in his dissenting opinion, is not to the contrary. The predicate for that case was that the Supreme Court had on constitutional grounds invalidated certain statutory presumptions, see id. at 666-67, and the petitioners were claiming that the statute under which they were convicted was invalid because it contained an unconstitutional presumption. See id. at 665. There is no such claim here. The petitioner does not maintain that § 924(c)(1) is unconstitutional or that it was unconstitutionally applied to him. He maintains only that the statute was wrongly applied to him.

For the foregoing reasons, we deny the certificate.

McMILLIAN, Circuit Judge, dissenting.

Arnold F. Hohn appeals from the district court's dismissal with prejudice of his 28 U.S.C. § 2255 motion claiming the benefit of Bailey v. United States, 116 S. Ct. 501 (1995). Section 102 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, amended 28 U.S.C. § 2253(c) to require a "substantial showing of the denial of a constitutional right" before a certificate of appealability may issue. The court denies Hohn a certificate. I must respectfully dissent.

Background

After a confidential informer told police Hohn was a high-level methamphetamine dealer, they investigated and obtained a no-knock warrant. When the police arrested Hohn in his living room, they found one gram of methamphetamine in his wallet. They also went to the kitchen where they found 15.8 grams of methamphetamine, three loaded pistols approximately one foot from the drug, and another firearm. In Hohn's bedroom the police found 3.1 grams of methamphetamine in a cigarette package and another loaded pistol approximately two feet from the package. Finally, in another bedroom they found drug paraphernalia and a gun case with shotguns and rifles. Cindy Vandry arrived at the house during execution of the warrant. She had twice purchased methamphetamine from Hohn at his home, and on those occasions she had observed "a substantial amount of currency in the bedroom."

The government charged Hohn with possession of methamphetamine with intent to distribute it, using and carrying fifteen firearms in relation to the methamphetamine offense, and being a felon in possession of firearms. He stood trial, admitted possession of some of the methamphetamine, admitted he owned the firearms as an avid gunsmith and hunter, disputed the police version of the location of some of the firearms, and testified he believed he could legally possess the firearms because his attorney had told him that his 1974 juvenile conviction for malicious destruction of property did not count as an adult felony.

At trial, counsel urged substitution of "for the purpose of" in place of "available to aid in the commission of" in the verdict director for the firearms "use" charge. The jury convicted Hohn on all counts. He did not raise the instructional issue in his pre-Bailey appeal. This court affirmed. United States v. Hohn, 8 F.3d 1301 (8th Cir. 1993).

In his § 2255 motion, Hohn argued: (1) his conduct was not a violation of 18 U.S.C. § 924(c)(1) as interpreted by Bailey; a fundamental miscarriage of justice would result unless the court addressed the issue; (3) he should not be penalized for not raising the issue on direct appeal because he relied on years of Eighth Circuit precedent; (4) denial of a remedy would show "a lack of due process in the judicial system," quoting United States v. Loschiavo, 531 F.2d 659, 666 (2d Cir. 1976) (affirming vacation of conviction on change-in-law ground not raised on direct appeal), and (5) he was prejudiced by the jury instruction that said no affirmative firearms use was required but that availability of a firearm was adequate for a guilty verdict.

The government responded that Bailey did not aid Hohn because evidence supported a carrying conviction. It admitted the verdict directing instruction was erroneous under Bailey, and Hohn was not carrying a firearm when officers executed the warrant. It argued, however, that the kitchen firearms, "within arm's reach of the methamphetamine," were in holsters and supported the inference that at some time Hohn "entered his residence and placed his belongings, which included the methamphetamine and firearms onto the counter." The government concluded it was obvious Hohn had carried the firearms during his drug trafficking activities, and the instructional error was harmless.

In reply, Hohn argued that the instruction was error under Bailey, citing United States v. Webster, 84 F.3d 1056, 1060, 1065-66 (8th Cir. 1996) (permitting brief on Bailey after initial submission of direct appeal and reversing because plain error in pre-Bailey jury instruction permitted conviction for "mere presence and ready availability" of firearm where defendant admitted purchase of a firearm for his protection). He also urged that the government's methamphetamine-within-arm's-reach-of-firearms argument was insufficient under United States v. White, 81 F.3d 80,

83 (8th Cir. 1996) (affirming "carrying" conviction on direct appeal and saying government must prove that the defendant bore the firearm on or about his person during and in relation to a drug trafficking offenses), quoting Bailey's language, "the inert presence of a firearm, without more, is not enough to trigger § 924(c)(1)." 116 S. Ct. at 508 (discussing different meanings of "use" - active employment, storage, placement for active use). He included a copy of Cynthia Vandry's testimony that she saw the rifles in the gun case but no handguns when she was at Mohn's house.

The district court noted Mohn had not raised the Bailey claim on direct appeal, found he had waived it, and dismissed the § 2255 motion with prejudice, quoting United States v. McKinney, 79 F.3d 105 (8th Cir. 1996) (2-1 decision) (holding Bailey issue waived on direct appeal because McKinney did not challenge previous cases, object to the instruction, or argue issue in opening brief).

Discussion

I dissent because I believe the Due Process Clause of the Fifth Amendment does not permit federal convictions for conduct that does not violate a federal statute.[1]

Congress must define federal criminal offenses. United States v. Hudson, 11 U.S. (7 Cranch) 32, 33 (1812). Judicial construction of a statute "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise

[1]For that reason, I also disagree with the court's holding that Bailey challenges cannot be raised in a § 2255 motion after a plea of guilty. Bousley v. Brooks, No. 95-2687, 1996 WL 560214, at *3-4 & nn.2-4 (8th Cir. Oct. 3, 1996). The better position is, in my opinion, United States v. Barnhardt, 93 F.3d 706, 708-09 (10th Cir. 1996) (applying Bailey retroactively in second § 2255 motion after defendant pleaded guilty) (collecting Bailey cases).

to that construction." Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13 (1994) (Rivers) (footnote omitted). Under these two principles, courts have granted post-conviction relief after changes in the law. See, e.g., Davis v. United States, 417 U.S. 333, 346-47 (1974) (§ 2255 proper when law changes so that conviction and punishment are for act the law no longer makes criminal) (change in interpretation of selective service regulation); United States v. Dashney, 52 F.3d 296, 299 (10th Cir. 1995) (applying new interpretation of "financial structuring" offense in § 2255 action after defendant had served sentence to prevent complete miscarriage of justice); Dalton v. United States, 862 F.2d 1307, 1310 (8th Cir. 1988) (finding new interpretation of mail fraud statute applicable but affirming because no prejudice shown under standard that trial error worked to § 2255 movant's "actual and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions," citing United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis in original)); Ingber v. Enzor, 841 F.2d 450, 454-55 (2d Cir. 1988) (applying new interpretation of mail fraud statute in § 2255 action and excusing failure to raise the claim under earlier interpretation).

The Second Circuit invoked constitutional principles when it confronted four § 2255 challenges to drug convictions in the wake of the Supreme Court's invalidation of statutory presumptions. The court relied on

> the simple and universal rule that a judgment in a criminal case in which the prosecution has offered and the record discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law. . . . We must examine the principles involved in the constitutional ruling under consideration and decide whether, upon "considerations of convenience, of utility, and of the deepest sentiments of justice," the judgments of conviction were so "tainted by some fundamental unfairness within the orbit of constitutional law" that we cannot allow them to stand.

United States v. Liguori, 438 F.2d 660, 669 (2d Cir. 1971) (internal citation omitted).

In post-Bailey § 2255 cases, the issue is not advance notice that conduct is criminal (the familiar void-for-vagueness claim), but delayed notice that conduct is not criminal (change-of-law claim under Rivers rationale). Because Bailey represents such a clear break with precedent regarding the definition of "use" under § 924(c)(1), Hohn had cause for failing to appeal the denial of his objection to the verdict director. United States v. Wiley, 922 F. Supp. 1405, 1411 (D. Minn. 1996) (Magnuson, C.J.); see also Dyer v. United States, 23 F.3d 1421, 1423-24 (8th Cir.) (rejecting change of law in another circuit as cause), cert. denied, 115 S. Ct. 136 (1994); Dalton v. United States, 862 F.2d at 1310 (finding cause after new interpretation of mail fraud statute).

Conclusion

I conclude that depriving persons of the benefit of the delayed notice that conduct is innocent violates Due Process by tolerating convictions for conduct that was never criminal. Under that proposition, a post-Bailey § 2255 motion presents a constitutional question as required by amended § 2253(c)(2). I also conclude Hohn's case presents a "substantial showing of the denial of a constitutional right." Accordingly, I would grant a certificate of appealability.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
ARNOLD F. HOHN,)
)
Defendant.)

8:CR90-93

MEMORANDUM OPINION

FILED
DISTRICT OF NEBRASKA
AT _____ M
JUL 18 1996
-187
Norbert H. Ebel, Clerk
By _____ Deputy

This matter is before the Court on the defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (filing 175). Because the Court finds that the defendant is not entitled to the relief he seeks, the Court will dismiss the defendant's motion.

In his motion, the defendant attacks his conviction for using a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). The defendant argues that, in light of the United States Supreme Court's opinion in *Bailey v. United States*, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), the government did not present enough evidence at his trial to sustain a conviction under § 924(c)(1). However, as Magistrate Judge Piester noted upon initial review of the defendant's motion, the defendant did not raise his *Bailey* claim on direct appeal. *See* filing 176, p. 3. Thus, the Court finds that the defendant has waived that claim, *see United States v. McKinney*, 79 F.3d 105, 109 (8th Cir. 1996)

(concluding that Mr. McKinney had waived his argument based on *Bailey* because "Mr. McKinney's motion for acquittal did not challenge the correctness of [the Eighth Circuit's] previous cases, he did not object to the instruction that embodied the principles announced in those cases, and he did not argue in his initial appeal brief that his conviction for using firearms was in any way infirm"), and that the defendant's motion, which is based on that claim, should be dismissed with prejudice. Accordingly, the Court will enter separate judgment dismissing the defendant's motion with prejudice.

Dated this 18 day of July, 1996.

BY THE COURT:

WILLIAM G. CAMBRIDGE, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA
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ROBERT M. GIEL
CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.

ARNOLD F. HOHN,

Defendant.

8:CR90-93

MEMORANDUM AND ORDER

Defendant Hohn has filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. (See filing 175). Liberally construing the allegations of the motion, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), I conclude that the government should respond to defendant's claim.

BACKGROUND

Defendant was convicted on one count of possession with intent to distribute methamphetamine near a school, in violation of 21 U.S.C. §§ 841(a), 845(a); one count of carrying a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1); and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g). Defendant was sentenced to serve a term of 90 months in prison. He appealed the sentence and the United States Court of Appeals for the Eighth Circuit affirmed.

Defendant now attacks his firearm conviction under 18 U.S.C. § 924(c)(1) on the ground that the government failed to present

evidence sufficient to establish that he "used" a firearm within the meaning that statutory section. As support for that claim defendant cites Bailey v. United States, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).[1]

DISCUSSION

A section 2255 motion is not a substitute for direct appeal. Anderson v. United States, 25 F.3d 704, 706 (8th Cir. 1994); Poor Thunder v. United States, 810 F.2d 817, 823 (8th Cir. 1987). As such, a claim which could have been presented on direct appeal generally will not be considered in a section 2255 proceeding absent a showing of "cause" for the failure to raise the issue and "actual prejudice" resulting from that failure. Ramey v. United States, 8 F.3d 1313, 1314 (8th Cir. 1993); Reid v. United States, 976 F.2d 446, 447-48 (8th Cir. 1992), cert. denied, 113 S. Ct. 1351 (1992). To show cause that would excuse such a procedural default, a defendant must show that some objective

[1] In Bailey, the United States Supreme Court held that, to obtain a conviction for use of a firearm under 18 U.S.C. § 924(c)(1), the government must prove "an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." Bailey, 116 S.Ct. at 505. In so ruling, the Supreme Court overruled prior authority holding that a defendant could be convicted under § 924(c)(1) based on evidence that the firearm was physically available to the defendant or that the defendant intended to use it if the need arose. See e.g., United States v. Jones, 990 F.2d 1047, 1050 (8th Cir. 1993) ("'use' may be inferred from the availability and presence of the firearm, and actual possession is not necessary provided the firearm is under the defendant's control"), cert. denied, 114 S.Ct. 699 (1994), denial of habeas corpus aff'd, 39 F.3d 1184 (8th Cir. 1994).

The Bailey decision applies retroactively. Bell v. United States, 917 F.Supp. 681, 683-84 (E.D. Mo. 1996); Sanabria v. United States, 916 F.Supp. 106, 109-14 (D. P.R. 1996); United States v. Turner, 914 F.Supp. 48, 49-50 (W.D. N.Y. 1996); Abreu v. United States, 911 F.Supp. 203, 206-07 (E.D. Va. 1996).

factor external to the defense prevented him from raising his defaulted claims. See Murray v. Carrier, 477 U.S. 478, 488 (1986).

Defendant in this case did not raise his Bailey claim on direct appeal. However, the Bailey decision was not handed down by the Supreme Court until December 6, 1995, more than two years after defendants' convictions had been affirmed by the Eighth Circuit. Because Bailey was not decided at the time of the direct appeal, there is adequate cause for defendant's failure to raise it. Bell v. United States, 917 F.Supp. 681, 684 (E.D. Mo. 1996); Abreu v. United States, 911 F.Supp. 203, 207 (E.D. Va. 1996). Further, because the facts of defendant's case arguably fall within the purview of Bailey, his conviction under 18 U.S.C. § 924(c)(1) may be invalid, and he thus has established sufficient prejudice. See id.[2]

Consideration of the substance of defendant's claim under Bailey is beyond the scope of this initial review. I shall therefore require the government to respond to defendant's claim.

IT THEREFORE HEREBY IS ORDERED:

1. Plaintiff is given twenty days from the date of this order to respond to the defendant's motion in accordance with the terms of this memorandum, pursuant to the rules following 28 U.S.C. §2255.

[2] The Eighth Circuit has recently held that Bailey is inapplicable where a defendant is convicted under section 924(c)(1) for "carrying" a firearm, as opposed to "using" a firearm. See United States v. White, ___ F.3d ___ (8th Cir. 1996) (available at 1996 WL 154228). The judgment in this case indicates that defendant was convicted of "carrying" a firearm in violation of section 924(c)(1). (See filing 158). However, the jury was instructed on both the "using" and "carrying" prongs of section 924(c)(1) and the verdict form does not clearly state which of those prongs the jury relied on in finding defendant guilty. (See filing 114, Instruction No. 7; filing 116). Thus, it is impossible to determine whether defendant was convicted under the "carrying" prong or the "using" prong of section 924(c)(1).

2. This file hereby is transferred to Omaha for all further proceedings. The clerk shall direct this matter to the attention of the assigned trial judge.

Dated ~~April~~ May 1, 1996.

BY THE COURT

David L. Piester
United States Magistrate Judge

UNITED STATES of America, Appellee,
v.
Arnold F. HOHN, Appellant.

No. 92-2653.

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 16, 1993.

Decided Nov. 8, 1993.

Defendant was convicted by the United States District Court for the District of Nebraska, William G. Cambridge, J., of distributing drugs within 1,000 feet of public school, and he appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) period during which court considered petition by pretrial services for action on conditions of pretrial release and period when defendant received in-patient drug treatment were excludable for purposes of Speedy Trial Act; (2) affidavit supporting search warrant set forth probable cause based on corroboration of informant's information by police officers; and (3) school yard statute's penalties applied even though school was not in session.

Affirmed.

[1] CRIMINAL LAW ⇐ 577.10(8)
110k577.10(8)
Speedy Trial Act allows for exclusion of periods of delay due to proceedings concerning defendant. 18 U.S.C.A. § 3161(h)(1)(F).

[2] CRIMINAL LAW ⇐ 577.10(7)
110k577.10(7)
Period of delay after pretrial services officer filed petition for action on conditions of defendant's pretrial release until final disposition after hearing was excluded for purposes of the Speedy Trial Act; pretrial services' petition was functional equivalent of government's motion to revoke detention within scope of statute's enumerated delays. 18 U.S.C.A. § 3161(h)(1)(F), (h)(4).

[3] CRIMINAL LAW ⇐ 577.10(7)
110k577.10(7)
Delay attributable to motion to revoke pretrial detention is excluded for purposes of Speedy Trial Act from date of filing until matter is taken under advisement by court. 18 U.S.C.A. § 3161(h)(1)(F), (h)(4).

[4] CRIMINAL LAW ⇐ 577.10(7)
110k577.10(7)
Any action taken by pretrial services is action by court excluded under Speedy Trial Act. 18 U.S.C.A. § 3161(h), (h)(1)(B, F, J), (h)(3)(A), (h)(7), (h)(8)(A).

[5] CRIMINAL LAW ⇐ 577.16(5.1)
110k577.16(5.1)
District court did not err when it allowed hearing on pretrial services' petition for actions on condition of pretrial release to be continued without making findings; court was not required to make explicit findings for excludable delays in action initiated by court. 18 U.S.C.A. § 3161(h)(1), (h)(1)(F), (h)(8)(A).

[6] CRIMINAL LAW ⇐ 577.11(6)
110k577.11(6)
Period of time when defendant was in drug treatment program before trial was properly excluded for Speedy Trial Act purposes, where district court did not receive all information necessary to determine defendant's motion to reconsider detention until he completed drug treatment. 18 U.S.C.A. § 3161(h)(1)(F), (h)(4).

[7] CRIMINAL LAW ⇐ 577.10(7)
110k577.10(7)
Motion to reconsider pretrial detention is pretrial motion for which time is excludable under Speedy Trial Act. 18 U.S.C.A. § 3161(h)(1)(F).

[8] DRUGS AND NARCOTICS ⇐ 189(3)
138k189(3)
No-knock search warrant of defendant's house was issued with probable cause, where police officers sufficiently corroborated information given by informant by conducting garbage inventory and testing drug-related items found in garbage. U.S.C.A. Const.Amend. 4; Neb.Rev.St. § 29-411; 18 U.S.C.A. § 3109.

[9] DRUGS AND NARCOTICS ⇐ 133
138k133

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Defendant was properly indicted for distributing drugs within 1,000 feet of school, though school was closed for remodeling, where public school system continued to carry school on its books, and children continued to use school grounds. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 419, as amended, 21 U.S.C.A. § 860.

*1302 James M. Davis, Omaha, NE, argued, for appellant.

Michael P. Norris, Omaha, NE, argued, for appellee.

Before MAGILL, Circuit Judge, LAY, Senior Circuit Judge, and HANSEN, Circuit Judge.

MAGILL, Circuit Judge.

Arnold F. Hohn (Hohn) appeals from the final judgment entered in the district court [FN1] upon a jury verdict of guilt on all offenses. Hohn's appeal challenges three rulings of the district court. Hohn contends that the district court erred by denying his motion to dismiss on Speedy Trial Act grounds, by denying his motion to suppress evidence, and, finally, by denying his motion to dismiss Count I of the indictment which charged him with the distribution of drugs within 1000 feet of a public school. For the reasons discussed below, we affirm.

FN1. The Honorable William G. Cambridge, United States District Judge for the District of Nebraska.

I. BACKGROUND

The Omaha, Nebraska, police received information from a confidential informant implicating Hohn as a methamphetamine dealer distributing from his home. The informant told the police, among other details, that Hohn was "paranoid," had a vicious dog, and always had at least one gun on his person. The police investigated the information received from the informant and, in the course of the police investigation, Hohn's curbside garbage receptacle was inventoried. The garbage inventory and subsequent testing revealed, among other drug-related items, a zip-lock bag and sno-seals [FN2] that both tested positive for methamphetamine. The police obtained a "no-knock" search warrant pursuant to Nebraska state law. Hohn was arrested when the search of his residence on June 20, 1990, resulted in the recovery of approximately sixteen grams of methamphetamine, drug paraphernalia, multiple weapons, and money.

FN2. Sno-seals are folded paper used to hold powdered substances such as cocaine and methamphetamine.

Hohn's residence was located within 177 feet of the Central Park Elementary School (Central Park). Central Park's last day of classes for the 1989-90 school year was June 7, 1990. Because the Omaha public school system planned to remodel and attach an addition to the present building, the student body was temporarily reassigned to another building for the 1990-91 school year. From the last day of classes through the date of Hohn's trial, Central Park was carried on the school system's books as a public school. On June 20, 1990, the date of Hohn's arrest, the public maintained access to the school grounds for recreational purposes.

Hohn was consequently indicted on August 24, 1990, on three counts: (I) possession with intent to distribute methamphetamine within 1000 feet of real property comprising a public school in violation of 21 U.S.C. § 845a; (II) use of a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1); and (III) being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g) and 924(a)(2). Hohn made an initial appearance at his arraignment on August 30, 1990.

To gain additional time for pretrial motions, the government and Hohn entered into a stipulated agreement to extend the time for pretrial motions until October 19, 1990. The court then entered an order stating that the time between September 19 and October 19 *1303 was excludable for Speedy Trial Act purposes.

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On October 1, 1990, a pretrial services officer filed a petition for action on conditions of pretrial release (the petition), thus notifying the court that Hohn's urine specimens had tested positive for amphetamine and methamphetamine. The court consequently held a hearing regarding that petition on October 11, 12, and November 9, 1990. The defendant and the government both presented evidence and argument at this hearing. The court found on November 9 that the government had presented clear and convincing evidence that Hohn had violated his conditions of release and ordered Hohn detained.

Hohn's counsel filed a motion to withdraw on December 10, 1990, and the court allowed Hohn's counsel to withdraw on December 18, 1990. On that same date, Hohn's new counsel filed a motion to reconsider detention and urged the court to place Hohn in drug treatment as opposed to continuing to detain him. The court requested pretrial services to investigate Hohn's eligibility for drug treatment and, on December 20, pursuant to pretrial services' advice, released Hohn and ordered him to complete inpatient drug treatment or return to custody. The December 20, 1990, order specifically stated that if Hohn successfully completed drug treatment, a subsequent hearing would be held regarding further terms and conditions of release. Hohn entered inpatient treatment at St. Gabriel's Alcohol and Drug Treatment Center on December 20, 1990.

Hohn filed a motion to dismiss on Speedy Trial Act grounds on January 14, 1991. Meanwhile, on January 23, 1991, Hohn completed drug treatment and was released pursuant to a court order specifying his terms and conditions of release.

II. DISCUSSION

A. The Speedy Trial Act Claim

The Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1988), requires that a criminal defendant be tried within seventy days of the indictment or the date of first appearance before a judicial officer, whichever is later. Id. § 3161(c)(1). The statute allows, however, certain delays to be excluded for purposes of calculating the seventy-day time limit. See id. § 3161(h). If the government fails to comply with the terms of the Speedy Trial Act, a defendant may move for dismissal either with or without prejudice. Id. § 3162(a). The district court's legal findings are reviewed de novo, but factual findings are reviewed under the clearly erroneous standard. United States v. Hoslett, 998 F.2d 648, 652 (9th Cir.1993).

Hohn argues that the court incorrectly excluded two periods of delay from its calculation for Speedy Trial Act purposes: (1) the period from October 20 through November 9 (twenty-one days), during which the court considered pretrial services' petition [FN3]; and (2) the period from December 21 through January 13, 1991 (twenty-four days), during which Hohn was treated as an inpatient at St. Gabriel's Alcohol and Drug Treatment Center. [FN4] The district court [FN5] excluded both these periods of time from its calculation of the seventy-day limit because it found that the first period was excludable pursuant to § 3161(h)(1)(F) as a pretrial motion and the second period of time was excludable pursuant to either § 3161(h)(1)(F) or, in the alternative, § 3161(h)(4). We find that for purposes of determining whether the Speedy *1304 Trial Act seventy-day limit had lapsed, both periods of time were properly excluded from the district court's calculation of time.

FN3. Pretrial services' petition was filed on October 1. However, the period of time up to and including October 19 is not in dispute.

FN4. The status of the other days is not in dispute. The parties agree that the period from August 31, 1990, through September 18, 1990, counts towards the 70-day limit (a total of 19 days). The parties likewise agree that September 19 through October 19 is excludable pursuant to the stipulated agreement. The parties agree that the period of time from November 10 through December 9 counts towards the 70-day limit (bringing the total to 49 undisputed days). The parties also agree that December 10 through December 20 is excludable due to the motions that were filed before the court.

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FN5. Magistrate Judge Richard G. Kopf made these findings. The district court, after a de novo review, adopted the magistrate judge's report in its entirety. The magistrate judge's findings subsequently adopted by the district court will be referred to as the district court findings.

1. October 20, 1990, through November 9, 1990

[1] The period of time from October 20 through November 9 was properly excluded pursuant to § 3161(h)(1)(F) (subsection (F)) as a pretrial motion. The Speedy Trial Act allows for the exclusion of periods of delay due to proceedings concerning the defendant. The Act states in pertinent part:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--
> ....
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.

18 U.S.C. § 3161(h)(1)(F).

[2] Hohn contends that the period of delay from October 20 through November 9 cannot be excluded pursuant to subsection (F) because subsection (F) refers to pretrial motions and not petitions. Hohn further contends that because the petition was filed by pretrial services, and not a party, the court may not exclude this period of delay pursuant to subsection (F). Finally, Hohn contends that when the court granted continuances from the hearing's initial date of October 11 to October 12 and then to November 9, the court erred when it failed to make the specific statutory finding required pursuant to § 3161(h)(8)(A).

Section 3161(h)(1) specifically states that the periods of delay are "including but not limited to," thus creating in the statute the presumption that the scope of its enumerated delays are not to be interpreted narrowly. A motion is an application to the court for an order. Fed.R.Crim.P. 47. Once pretrial services had filed its petition, the government, now notified of Hohn's possible violation of his terms of release, was requesting the court to revoke Hohn's release--issue an order--when it presented its argument and evidence before the court on October 11, 12, and November 9.

We find that pretrial services' petition is the functional equivalent of a motion to revoke detention. Pretrial services discovered through urine testing that Hohn tested positive for methamphetamine. The use of methamphetamine was a violation of Hohn's original conditions of release and hence pretrial services was obligated to inform the court of its discovery. After the petition was filed, the government proceeded to prosecute the claim that Hohn had violated the court's original conditions of release. The court noted in its order revoking release that the government had established clear and convincing evidence that the defendant violated a term of release. Hence, the court treated the petition precisely as it would have treated a motion for revocation of release brought either by the court's own motion or by the government. If the initial filing with the court had been brought by the government as a motion, Hohn's contention that the period from October 20 through November 9 cannot be excluded for Speedy Trial Act purposes would be untenable.

Petitions may be the functional equivalent of other recognized § 3161(h)(1) delays. See United States v. Davenport, 935 F.2d 1223, 1233 (11th Cir.1991); accord United States v. Tyler, 878 F.2d 753, 757 (3d Cir.), cert. denied, 493 U.S. 899, 110 S.Ct. 254, 107 L.Ed.2d 203 (1989). In Davenport, the defendant filed a petition for a writ of habeas corpus alleging that his pretrial detention violated the Speedy Trial Act. 935 F.2d at 1231. The Davenport court found that an extraordinary writ such as a petition for a writ of habeas corpus was functionally equivalent to an interlocutory appeal which is statutorily excludable under § 3161(h)(1)(E), because both an interlocutory appeal and a petition for a writ serve the same

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underlying purpose. Id. at 1233. Hence, in Davenport, time related to the petition for a writ's determination tolled the Speedy Trial Act clock. *1305 Similarly, we find that pretrial services' petition for action on conditions of pretrial release is the functional equivalent of a motion to reconsider pretrial release, because both serve the same underlying purpose.

[3] Motions excludable under subsection (F) include any pretrial motion and are not limited to those motions enumerated in Federal Rule Criminal Procedure 12(b)(2). United States v. Wilson, 835 F.2d 1440, 1443 (D.C.Cir.1987). Pretrial motions are excludable under subsection (F) because these motions require both court and party time. Id. Delay attributable to motions to revoke pretrial detention, from the date of filing until the matter is taken under advisement by the court, [FN6] is excluded pursuant to subsection (F). United States v. Bowers, 834 F.2d 607, 609 (6th Cir.1987). Thus, because pretrial services' petition is the functional equivalent of a motion to revoke pretrial detention, we find the time from the date the petition was filed until its final disposition at the end of the hearing is excluded for purposes of the Speedy Trial Act.

FN6. Subsection (F) excludes time from a motion's filing until either the motion is disposed of or taken under advisement. If the court requires time to consider the motion after all information is available, this time is limited to 30 days pursuant to § 3161(h)(1)(J). Henderson v. United States, 476 U.S. 321, 329, 331, 106 S.Ct. 1871, 1876, 1877, 90 L.Ed.2d 299 (1986).

[4] A nonparty to a criminal action may initiate a delay excludable pursuant to § 3161(h). Excludable delays may be caused by co-defendants. See id. § 3161(h)(7). Excludable delays may also be initiated by the court. See, e.g., id. § 3161(h)(1)(B), (C), (3)(A), (8)(A). The Pretrial Services Act of 1982 [FN7] established pretrial services in each judicial district in order to assist judicial officers both in making pretrial release decisions and to supervise and monitor the conditions of release. S.Rep. No. 97-77, 97th Cong., 2d Sess. 1 (1981), reprinted in 1982 U.S.C.C.A.N. 2377. The actions of pretrial services officers are both a service to the court and an extension of the court. Any action taken by pretrial services is in effect an action by the court and thus contemplated by Congress in enacting the Speedy Trial Act.

FN7. See 18 U.S.C. § 3152 (1988).

[5] Hohn's argument that the district court erred when it failed to make a § 3161(h)(8)(A) [FN8] statutory finding is without merit. Section 3161(8)(A) allows a court to grant continuances should that court find it is in the interests of justice to do so after weighing the best interests of the defendant and the public to a speedy trial. The court under § 3161(8)(A) is required to make explicit findings; the court is not required to make explicit findings for § 3161(h)(1) delays. Section 3161(8)(A) provides an additional basis, in addition to the (h)(1) bases, for the court to grant a delay which will toll the Speedy Trial Act clock. For example, § 3161(8)(A) is frequently used by the court to grant continuances which will toll the Speedy Trial Act clock when, due to complexities in the case, counsel requires additional time to prepare. See United States v. Driver, 945 F.2d 1410, 1414 (8th Cir.1991), cert. denied, 502 U.S. 1109, 112 S.Ct. 1209, 117 L.Ed.2d 448 (1992); United States v. Fogarty, 692 F.2d 542, 546 (8th Cir.1982), cert. denied, 460 U.S. 1040, 103 S.Ct. 1434, 75 L.Ed.2d 792 (1983). The district court did not err when it allowed the hearing to be continued without making findings; here, the time was properly excluded pursuant to subsection (F), not § 3161(8)(A).

FN8. 18 U.S.C. § 3161(h)(8)(A) states in pertinent part: Any period of delay resulting from a continuance granted by any judge ... if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth ... its reasons for finding that the ends of justice served by the granting of such continuance

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outweigh the best interests of the public and the defendant in a speedy trial.

2. December 21, 1990, through January 13, 1991

[6] We further find that the period of time from December 21, 1990, through January *1306 13, 1991, was properly excluded for Speedy Trial Act purposes pursuant to subsection (F). [FN9] Hohn filed a motion to reconsider detention on December 18. [FN10] The district court requested the advice of pretrial services. After a hearing on December 20, 1990, and upon the advice of pretrial services, the court entered an order conditionally releasing Hohn on December 20 in order that Hohn could be evaluated at St. Gabriel's Alcohol and Drug Treatment Center. If Hohn was not accepted into drug treatment, he was to be returned to the custody of the United States Marshal. If Hohn failed to successfully complete drug treatment, he was to be returned to the custody of the Marshal. Only upon successful completion of the drug treatment program would the district court then consider granting a release order with specific terms and conditions.

FN9. The district court found this period of time was also excludable pursuant to § 3161(h)(4); that is, the district court found that Hohn while in drug treatment was physically unable to stand trial. Because we find this period of time was properly excluded pursuant to subsection (F), we need not reach the issue of Hohn's physical availability for trial while in drug treatment.

FN10. Hohn concedes that subsection (F) excludes the period of time from December 18 through December 20 and is therefore only contending that the period from December 21 through January 13 was improperly excluded.

[7] A motion to reconsider pretrial detention is a pretrial motion for which time is excludable pursuant to subsection (F). United States v. Noone, 913 F.2d 20, 27 (1st Cir.1990), cert. denied, 500 U.S. 906, 111 S.Ct. 1686, 114 L.Ed.2d 81 (1991). Thus, when Hohn filed his motion to reconsider detention on December 18, subsection (F) tolled the Speedy Trial Act clock until all information necessary to that motion's determination was before the court. Subsection (F) excludes the period of time after a motion is submitted but before it is under advisement. Henderson, 476 U.S. at 331, 106 S.Ct. at 1877. That is, subsection (F) excludes the period of time after a hearing in which the court record may remain open to receive further information. Here, the district court did not receive all the information necessary to determine the motion to reconsider detention until January 23, 1991, when Hohn completed drug treatment. The district court's order setting conditions of release was not issued until January 23, 1991. Consequently, during the entire time period at issue, from December 21 until January 13, 1991, the Speedy Trial Act clock was tolled pursuant to subsection (F).

We therefore find that both the period of time from October 20 through November 9 and the period of time from December 21 through January 13, 1991, were properly excluded pursuant to subsection (F). Hence, the motion to dismiss was properly denied because only forty-nine nonexcludable days had passed since Hohn's arraignment before a judicial officer.

B. Other Claims

Hohn makes two other claims: (1) that the district court erred when it denied his motion to suppress evidence, and (2) that the district court erred when it denied his motion to dismiss Count I.

[8] Hohn asserts that evidence obtained from the search of his home should not have been admissible at his trial because the search warrant was defective. He claims that the search warrant was issued without probable cause, and he claims that the state-issued no-knock search warrant [FN11] violated 18 U.S.C. § 3109. Neither contention has merit. The district court properly concluded that the affidavit supporting the search warrant set forth probable cause, because the police officers sufficiently corroborated the information given by the informant. Furthermore, 18 U.S.C. § 3109 [FN12] is

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inapplicable. See United States v. Moore, 956 F.2d 843 (8th Cir.1992). The issue is not whether the *1307 warrant complied with § 3109 but whether the state officials complied with Nebraska law and the Fourth Amendment. See id. at 848. We find that the district court properly denied the motion to suppress the evidence obtained from this warrant because it was supported by probable cause and complied with Nebraska law and the Fourth Amendment.

FN11. In Nebraska no-knock warrants are expressly allowed. Neb.Rev.Stat. § 29-411 (1989).

FN12. 18 U.S.C. § 3109 provides: The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

[9] Hohn also contends that Count I of the indictment should have been dismissed because he did not distribute drugs within 1000 feet of a school. The schoolyard statute [FN13] enhances the penalty for individuals convicted of distributing drugs within 1000 feet of a school. 21 U.S.C. § 860 (Supp. III 1988). Hohn's residence was located within 177 feet of Central Park. He argues that Central Park was not a public school at the time of the offense because it was not operational. That is, Hohn maintains that because Central Park was closed for remodeling at the time of the arrest that it was not a school as a matter of law.

FN13. Hohn was charged in Count I with a violation of 21 U.S.C. § 845a; however, this statute has been transferred to 21 U.S.C. § 860.

The schoolyard statute, however, is unambiguous. For conviction, it simply requires that the defendant have an intent to distribute (or manufacture) a controlled substance and at the time be within 1000 feet of a school. See 21 U.S.C. § 860. Nothing in the statute requires that school be in session or that children be near or around the school at the time of the offense. See United States v. Jones, 779 F.2d 121, 123 (2d Cir.1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1236, 89 L.Ed.2d 344 (1986). In Jones, the defendant argued that the schoolyard statute did not apply to his distribution of drugs because the offense occurred at night without any potential for affecting children. Id. The Jones court rejected this argument finding, as we do, that the language in the statute is unambiguous and does not require that a school be open at the time of the offense. Id.

The magistrate judge found in an opinion adopted by the district court that as a preliminary matter there was sufficient evidence to find that Central Park was a school. The final determination as to whether Central Park met the statutory definition of school was determined by the magistrate judge to be a question of fact appropriate for the jury. See also United States v. Brookins, 919 F.2d 281, 284 (5th Cir.1991) (holding that there was sufficient evidence before the jury for it to find by any common definition that the institution in question was a school). We agree. The Omaha public school system continued to carry Central Park on its books as a school. The children continued to use the school grounds. A school need not be in session to trigger the schoolyard statute's penalties. The district court did not err when it denied Hohn's motion to dismiss Count I.

III. CONCLUSION

Accordingly, we find that the district court properly denied Hohn's motion to dismiss on Speedy Trial Act grounds, his motion to suppress evidence, and his motion to dismiss Count I of the indictment. We affirm the judgment of the district court.

END OF DOCUMENT

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-3118NEO

Arnold F. Hohn,

Appellant,

vs.

United States of America,

Appellee.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge McMillian, Judge Beam, Judge Loken, and Judge Hansen would grant the suggestion. The petition for rehearing by the panel is also denied.

February 10, 1997

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA
95 JUN 29 PM 4:13
ROBERT H. EBEL
CLERK

UNITED STATES OF AMERICA, Plaintiff,	)	8:CR 90-00093
vs.	)	ANSWER TO FILING #175
ARNOLD F. HOHN, Defendant.	)	

Pursuant to Rule 5, Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code, and this Court's Order of May 1, 1996, the United States answers Filing #175, Defendant's Motion to Vacate, Set Aside or Correct Sentence, as follows:

1. The United States denies that Arnold F. Hohn is entitled to any post-conviction relief. No evidentiary hearing has been accorded regarding the post-conviction motion. An evidentiary hearing will not be needed as this matter can be resolved on the basis of the record and files before the Court. The United States respectfully submits that this is an issue of law that must be developed from the transcript of the record at trial and post-conviction pleadings and briefs.

2. Hohn claims that his Section 924(c) conviction should be vacated because of the United States Supreme Court's recent decision in Bailey v. United States, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). The United States denies that the Supreme Court's decision in Bailey would grant relief to Hohn. The United States would submit that sufficient evidence was presented to support the jury's verdict and Hohn's conviction for carrying a firearm.

3. The United States acknowledges that the jury instruction provided does not comport with the status of law since the Supreme Court's decision in Bailey.

Under Federal Rule of Criminal Procedure 30, in order to claim error in a jury instruction, an objection is required which specifies the grounds of the objection. In the present case, the charge to the jury with regard to the 924(c) violation is found in instruction #7. Although Hohn objected to instruction #7, his objection did not go to whether one must affirmatively brandish a firearm but, rather, objected to the wording of the particular instruction. Specifically, Hohn asked the Court to drop the words "to aid in the commission of" and substitute the words "for the purpose of aiding in the commission of." (Tr. at 1332-34). Therefore, only if there is plain error, may this the Court vacate the conviction.

In United States v. Caldwell, 954 F.2d 496 (8th Cir. 1992), the Eighth Circuit Court of Appeals said

> "the Supreme Court has explained that the plain-error doctrine 'authorizes the Court of Appeals to correct only 'particularly egregious errors'. . . that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" United States v. Young, 470 U.S. 1, 15 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 (1982) and United States v. Atkinson, 297 U.S. 157, 160 (1936)).

The plain-error rule is to be "'used sparingly,'" and only when there has been a fundamental error so basic and prejudicial that justice could not have been done, or when the error deprives the accused of a fundamental right. Young, 470 U.S.

at 15 (quoting Frady, 456 U.S. at 63); United States v. Garcia, 897 F.2d 1413, 1422 (7th Cir. 1990). Id. 500-501.

The government agrees that it would be plain-error had the instructions only given the jury the option of convicting the defendant under the "use" prong of 18 U.S.C. § 924(c), and the evidence only supported that option. However, in this case, as in Bailey, the jury was instructed that the defendant could be convicted if he used or carried a firearm.

4. The question remains as to the appropriate standard of review. The Third Circuit, in a case involving a Bailey question, has observed:

> "we must now determine whether the district court's error in instructing the jury was harmless or requires reversal of Mr. Price's conviction on the Section 924(c)(1) count. The error was one of statutory interpretation, not constitutional in nature. "We upheld that non-constitutional error is harmless when 'it is highly probable that the error did not contribute to the judgement.'" . . . citations omitted. Because we conclude that the error was harmless, we will affirm.

United States v. Price, 1996 W.L. 67398 (3rd Cir. (Pa.)), at p. 4.

If the Court determines that the error was constitutional in nature, the standard of review would be whether the error was harmless, beyond a reasonable doubt. See United States v. Davis, 417 U.S. 333, 346 (1974); Chapman v. California, 386 U.S. 11 (1967).

5. Evidence was presented to the jury that Hohn carried a firearm. That evidence is recited in the prosecution version and can be found at the transcript of trial. It is true that Hohn did

not have a firearm on his person when the Omaha Police Division's Emergency Response Unit entered and secured the residence for the purpose of executing a search warrant. However, a reasonable inference can be drawn from the evidence that Hohn was carrying a firearm prior to the officers' entry based upon the items that were located, i.e., drugs, guns and ammunition, and where they were located.

The search resulted in the recovery of approximately 16 grams of methamphetamine. One of those grams was recovered from Hohn's person. (Tr. at 408, 646; Exhibit 1). Approximately 12 grams of methamphetamine were contained in a brown case on the kitchen counter. The methamphetamine was further contained in four plastic baggies, three of which held 3.5 grams of methamphetamine. This methamphetamine was surrounded by a .380 caliber semi-automatic pistol, a Colt revolver and a Ruger .357 pistol, all within arms reach of the methamphetamine. Each of these weapons was loaded. (Tr. at 159-160, 163-169, 647; Exs. 8, 9, and 10). Two additional firearms, a Ruger .22 caliber semi-automatic pistol and an Excam .22 caliber revolver were also found in the kitchen. (Tr. at 417-420, 648; Exs. 18, 19 and 20).

The .380 caliber semi-automatic pistol and the Colt revolver found on the kitchen counter within arms reach of the methamphetamine, packaged for redistribution, were found in holsters. The obvious inference to be drawn from this evidence is that Hohn, at some time prior to the execution of the search warrant, entered his residence and placed his belongings, which

included the methamphetamine and firearms, onto the counter. Therefore, at some point prior to the execution of the search warrant, he obviously carried the firearms during his drug trafficking activities.

6. The evidence obviously establishes "carrying," under 18 U.S.C. § 924(c). The Supreme Court said in Bailey, "a firearm can be carried without being used, e.g., when an offender keeps a gun hidden in his clothing throughout a drug transaction." Furthermore, in United States v. Freisinger, 937 F.2d 383, 387 (1991), this court held that transporting weapons in the passenger compartment of a car constitutes carrying them within the meaning of the statute.

7. The United States respectfully submits that the instruction to the jury was error, but harmless. The United States respectfully submits that the Motion to Vacate, Set Aside or Correct Sentence should be denied. The United States would inform the Court that a similar issue is presently before the Eighth Circuit Court of Appeals. On April 8, 1996, the Court heard argument in United States v. Behler, Case No. 92-3956NEL. As of this date, a decision has not been rendered.

Respectfully submitted,

THOMAS J. MONAGHAN
United States Attorney

Michael P. Norris

By: MICHAEL P. NORRIS (#17765)
Assistant United States Attorney
P.O. Box 1228-DTS
Omaha, Nebraska 68101-1228

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing was served on the following by placing same in the U.S. Mails, postage prepaid, this 28th day of June, 1996.

Arnold F. Hohn, #13249-047
P.O. Box 1000
Leavenworth, Kansas 66048

Michael P. Norris
Assistant U.S. Attorney

Eighth Circuit instructions to the extent they have and I will withdraw my request for them.

THE COURT: All right. Thank you. Now, Mr. Cohen, do you have any objections to the Court's proposed instructions 1 through 30 --

MR. COHEN: Yes, Your Honor.

THE COURT: -- inclusive, as they have now been amended?

MR. COHEN: Yes, Your Honor, I do. I think I have just two. The first concerns Instruction Number 7.

THE COURT: All right.

MR. COHEN: The present language half way down the page that paragraph starts out, "The phrase 'used a firearm' means having a firearm available to aid in the commission of," and it goes on and then later in that same paragraph says, "but does not require proof beyond a reasonable doubt that the firearm was available to provide protection." And I would ask that the Court change the phrase to instead read, "for the purpose of."

THE COURT: I'm sorry, I am --

MR. COHEN: I wasn't very eloquent. I believe the instruction as it is now allows this jury to find that merely having a firearm available is sufficient, and in this case where the defendant collected guns and used them for other purposes, there is on doubt that firearms were available

to aid in the commission of a drug offense, but whether those firearms were present for the purpose of aiding in the commission of that offense is a different question, and I think the intent of the statute was to prohibit people from using firearms to further their drug activities. I think this instruction as it is now allows the jury to convict Mr. Hohn even if there was no evidence that he was using these firearms to or that he had them available to him to further his drug activities. So I am suggesting that we should drop the where it says, "to aid in the commission of" and change that to read "for the purpose of aiding in the commission of."

THE COURT: That phrase comes out of the pattern Eighth Circuit, it doesn't come out of the pattern Eighth Circuit instruction itself, the form of it, which is 6.18.924, but it comes out of the language that is contained in the section of that pattern instruction entitled Notes on Use. I refer specifically to page 4 thereof, which is footnote 8, footnote 8 of the instruction, the pattern form instruction, which is in place in the form following the word carry. There it says, "No definition of carry is provided, but where carrying is charged," and it is charged here, "a definition may be appropriate. Carrying does not depend on proof that the defendant had actual possession of the weapon or used it in any affirmative manner," with reference to, cited there, three cases. One of them is the Fifth Circuit case decided

the United States versus Rayborn (phonetic), United States versus Costa Czarez (phonetic) and United States versus Brookington (phonetic) and then it goes on. It does not, the comment goes on or the note goes on to say that it does not, it does require evidence that the firearm was available to provide protection to the defendant in connection with his drug trafficking, or to facilitate his success. The original version of this statute, some affirmative use of the weapon would require a nonviolent, nondrug trafficking crime, however, crimes in this category are no longer covered by this statute. The objection is overruled. I am going to add, however, to the paragraph the words after the words, I am talking now about the paragraph that starts out the phrase,"used a firearm," means having a firearm available, et cetera, I am going to add on to the end of that paragraph the words "or to facilitate success."

All right, any other objections?

MR. COHEN: Yes, Your Honor. Instruction Number 8. The last sentence of the first page, "You are instructed that malicious destruction of property is a crime punishable by imprisonment for more than one year under the laws of the State of Nebraska." I would object to that. This was a 1974 conviction under the laws of the State of Nebraska. There has been no evidence as to what the maximum penalty for that crime was at that time. In fact, the only evidence the Government

crime, a lesser included offense under Count I.

Instruction Number 7. The crime of using and carrying a firearm during and in relation to a drug trafficking crime, as charged against the defendant, Arnold F. Hohn, in Count II of the indictment has two essential elements, which are:

One, the defendant committed the crime of possession of Methamphetamine with intent to distribute; and

Two, during and in relation to the commission of that crime the defendant knowingly used or carried a firearm.

The phrase "used a firearm" means having a firearm available to aid in the commission of possession of Methamphetamine with intent to distribute. Similarly, the phrase "carried a firearm" does not require proof of actual possession of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was available to provide protection in connection with the possession of Methamphetamine with intent to distribute or to facilitate success.

For you to find the defendant Arnold F. Hohn, guilty of the crime charged under Count II of the indictment, the Government must prove both of these essential elements beyond a reasonable doubt; otherwise you must find the defendant, Arnold F. Hohn, not guilty of the crime charged under Count II of the indictment.

ORIGINAL

No. 96-8986

Supreme Court, U.S.
FILED
AUG 18 1997
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARNOLD F. HOHN

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

ELIZABETH D. COLLERY
Attorney

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Washington, D.C. 20530-0001
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QUESTION PRESENTED

Whether petitioner's motion under 28 U.S.C. 2255, which alleged that his conviction under 18 U.S.C. 924(c) for using and carrying a firearm during and relation to a drug trafficking crime could not stand under this Court's later decision narrowing the "use" element in Bailey v. United States, 116 S. Ct. 501 (1995), made a purely statutory claim, or made a "substantial showing of the denial of a constitutional right" as required to obtain a certificate of appealability under 28 U.S.C. 2253(c)(2).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-8986

ARNOLD F. HOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 99 F.3d 892 (1996).

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1996. A petition for rehearing was denied on February 10, 1997. The petition for a writ of certiorari was filed on May 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for th District of Nebraska, petitioner was convicted of possession of ethamphetamine within 1,000 feet of a public school with intent to

distribute it, in violation of 21 U.S.C. 845(a); using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1); and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g) and 924(a)(2). Petitioner appealed his sentence and the court of appeals affirmed. United States v. Hohn, 8 F.3d 1301 (8th Cir. 1993).

Petitioner then filed a motion under 28 U.S.C. 2255, challenging his conviction under 18 U.S.C. 924(c)(1). The district court dismissed the motion, Pet. App. 8a-9a, and the court of appeals denied petitioner's request for a certificate of appealability. Id. at 1a-7a.

1. The evidence at trial showed that, on June 20, 1990, police officers executed a search warrant at petitioner's house in Omaha, Nebraska. As a result of their search, police recovered approximately 16 grams of methamphetamine, including one gram recovered from petitioner's person. The police discovered in a brown case on the kitchen counter 12 grams of methamphetamine that was packaged for redistribution. Within arm's reach of the methamphetamine, the police found a loaded .380 caliber semi-automatic pistol, a loaded Colt revolver, and a loaded Ruger .357 pistol. The .380 caliber semi-automatic pistol and the Colt revolver were in holsters. The police also found in the kitchen a grinder bearing methamphetamine residue, a Ruger .22 caliber semi-automatic pistol, and an Excam .22 caliber revolver. On top of a dresser in petitioner's bedroom, police discovered a cigarette pack containing three grams of methamphetamine, a loaded handgun and

$293 in currency. Pet. App. 25a; Gov't Br. in Opp. to Pet. for Rehearing ("Gov't Rehearing Brief") at 2; see also Pet. App. 15a.

2. Petitioner appealed, but did not challenge the sufficiency of the evidence to support his conviction under 18 U.S.C. 924(c)(1). The court of appeals affirmed. United States v. Hohn, 8 F.3d 1301 (8th Cir. 1993).

3. On December 6, 1995, this Court held, in Bailey v. United States, 116 S. Ct. 501 (1995), that a conviction for use of a firearm under Section 924(c) "requires evidence sufficient to show an active employment of the firearm by the defendant." Id. at 505. Active employment includes uses such as "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire" the weapon. Id. at 508. By contrast, possession of a firearm -- without more -- does not constitute a "use," nor does "placement of a firearm to provide a sense of security or to embolden[.]" Ibid.

4. Petitioner filed a pro se motion under 28 U.S.C. 2255 making two claims. First, he contended that, under Bailey, the facts established at his trial were insufficient to support a conviction for violating Section 924(c)(1). Petitioner acknowledged that he had not raised such an insufficiency claim on direct appeal, but argued that his default should be excused because his conduct "was not a crime" and, therefore, it would be a "fundamental miscarriage of justice" not to review his claim. Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255, at 8. Second, petitioner challenged the jury

instructions at his trial. He argued that the jury instructions did not properly define the phrase "use a firearm" to require proof of active use, and that correct jury instructions would likely have produced an acquittal. Id. at 11.

In response, the government contended that petitioner was not entitled to relief under Bailey because the evidence at trial was sufficient to show that petitioner had "carried" a firearm. Noting that the police found weapons in holsters within arm's reach of methamphetamine in petitioner's kitchen, the government argued that the jury could infer that petitioner had "entered his residence and placed his belongings, which included the methamphetamine and the firearms, onto the counter." Pet. App. 25a-26a. The government acknowledged that, under Bailey, the jury instructions at petitioner's trial erroneously defined the word "use," but it contended that the error was harmless because "[t]he evidence obviously establishes 'carrying.'" Id. at 22a-26a.

The district court held that petitioner had waived his Bailey claim by failing to raise it on direct appeal. Pet. App. 8a-9a. In so holding, the court relied on United States v. McKinney, 79 F.3d 105, 109 (8th Cir. 1996), in which the Eighth Circuit held that a defendant who had not raised a Bailey claim at trial or in his initial brief on direct appeal had waived it. This Court recently vacated and remanded McKinney for further consideration in light of Johnson v. United States, 117 S. Ct. 1544 (1997). McKinney v. United States, 117 S. Ct. 1816 (1997).[1]

5. a. On April 24, 1996, while petitioner's Section 2255 motion was pending in the district court, the President signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("the Act" or "the AEDPA"). Title I of the Act made changes to the law governing motions for collateral relief for federal prisoners under 28 U.S.C. 2255. Section 102 of the Act amended 28 U.S.C. 2253 to require a prisoner to obtain a "certificate of appealability" before appealing from a district court's denial of his Section 2255 motion. The new provision states that "unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * the final order in a proceeding under section 2255." 28 U.S.C. 2253(c)(1)(B). A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2).

b. On July 29, 1996, petitioner sought to appeal from the district court's decision denying his motion. See Gov't Rehearing Brief 4. The court of appeals, however, denied him a certificate of appealability, concluding that he had not made a "substantial showing of the denial of a constitutional right." Pet. App. 1a-2a. The court noted that petitioner had argued in the district court in

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[1] On remand, the Eighth Circuit reached the merits of McKinney's Bailey claim and vacated his conviction. The court held that evidence that McKinney kept weapons in a drug fortress did not show that he had used weapons under Section 924(c). United States v. McKinney, No. 95-2132, 1997 WL 395262 (8th Cir. July 16, 1997).

his motion for collateral relief that the jury instructions at his trial were inconsistent with Bailey. As a result, the court of appeals concluded, "petitioner is not making a constitutional claim. He is making a claim to a federal statutory right." Ibid. Because "Bailey did no more than interpret a statute, and an incorrect application of a statute by a district court, or any other court, does not violate the Constitution," the court of appeals denied a certificate of appealability. Id. at 2a.

Judge McMillian dissented. Id. at 2a-7a. After noting that courts have granted post-conviction relief following a change in the law, the dissent stated that "'a judgment in a criminal case in which the prosecution has offered and the record discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law.'" Pet. App. 6a (quoting United States v. Liguori, 438 F.2d 663, 669 (2d Cir. 1971)). The dissent also found that petitioner had "cause" for failing to challenge the jury instructions on appeal "[b]ecause Bailey represents such a clear break with precedent regarding the definition of 'use' under § 924(c)(1)." Id. at 7a. Accordingly, the dissent concluded that this case presented a "substantial showing of the denial of a constitutional right." Ibid.

Petitioner sought rehearing, with a suggestion for rehearing en banc. In opposing further review, the government took the position that the panel's decision was correct. The full court of appeals denied rehearing en banc, with Judges McMillian, Beam, Loken, and Hansen dissenting. Pet. App. 21a.

DISCUSSION

Petitioner seeks review of the court of appeals' holding that he was not entitled to a certificate of appealability because his claim -- that he is presently incarcerated for conduct that, under Bailey, is not criminal -- raises a statutory, not a constitutional, issue. We agree that claims of the kind raised by petitioner in his motion under Section 2255 may fairly be characterized as "constitutional," and that the court of appeals erred in concluding otherwise. Accordingly, we believe that the judgment of the court of appeals should be vacated and the case remanded for further consideration of whether a certificate of appealability should be granted here.

1. In Bailey, this Court "clarif[ied] the meaning of 'use' under § 924(c)(1)" by looking to "the language of the statute" and "consider[ing] not only the bare meaning of the word ['use'] but also its placement and purpose in the statutory scheme." 116 S. Ct. at 506. That holding resolved a question of statutory construction. The Court did not purport to apply or construe the Constitution, but rather "determine[d] the meaning Congress intended." Id. at 505-506. Thus, "Bailey did not establish a new rule of constitutional law, but simply interpreted a substantive criminal statute." In re Dorsainvil, No. 96-8074, 1997 WL 409442 at *3 (3d Cir. July 23, 1997) (citing cases from the Fourth, Seventh, Tenth, and Eleventh Circuits agreeing with that proposition).

The fact that petitioner's Section 2255 motion invoked a

statutory holding of this Court, however, does not mean that his claim is purely a statutory one. In bringing a collateral challenge to the sufficiency of the evidence and the adequacy of the jury instructions, a movant under Section 2255 is entitled to rely on the statutory meaning of the word "use" as later interpreted by this Court in Bailey.[2] A contention that, in light of Bailey, the evidence was insufficient to support a conviction under Section 924(c)(1) may state a claim under the Due Process Clause. See Jackson v. Virginia, 443 U.S. 307, 313-316 (1979) (Due Process Clause requires that a criminal conviction rest on evidence sufficient to support a conclusion by a rational trier of fact that every element of the offense has been established beyond a reasonable doubt). A contention that the jury instructions failed to require the jury to make findings on every essential element of the offense under Section 924(c), as construed in Bailey, may state a claim under the Fifth and Sixth Amendments. See United States v. Gaudin, 115 S. Ct. 2310, 2320 (1995) ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged."). Petitioner raised claims of both varieties

[2] Several courts of appeals have so held in considering motions under Section 2255 relying on Bailey. See, e.g., Stanback v. United States, 113 F.3d 651, 654 & n.2 (7th Cir. 1997); United States v. McPhail, 112 F.3d 197, 199 (5th Cir. 1997); United States v. Barnhardt, 93 F.3d 706, 708-709 (10th Cir. 1996). Courts have reached the same conclusion in considering other new decisions narrowing the substantive scope of a criminal statute. See United States v. McKie, 73 F.3d 1149, 1153 (D.C. Cir. 1996); United States v. Dashney, 52 F.3d 298, 299 (10th Cir. 1995); United States v. Good, 969 F.2d 774 (9th Cir. 1992).

in his pro se motion for collateral relief under 28 U.S.C. 2255. See pp. 3-4, supra.[3]

Claims of the sort that petitioner raised do not automatically satisfy Section 2253(c)(2)'s requirement of a "substantial showing of the denial of a constitutional right." For example, a claim under Section 924(c) that the evidence was insufficient to show a "use" of a firearm in light of Bailey would not constitute a substantial showing of the denial of a constitutional right absent an indication that the evidence was insufficient to show a "carrying." See United States v. Eyer, 113 F.3d 470, 475-476 (3d Cir. 1997) (Section 924(c) conviction can be sustained based on evidence of "carry" without regard to "use"). But Section 2253(c)(3) does not require certainty that the collateral petitioner would prevail. See Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (to make a substantial showing, a petitioner must demonstrate that the issues are "'debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.'") (quoting Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. 1980) (emphasis in original; internal quotation marks omitted)). The court of appeals did not evaluate

[3] In Davis v. United States, 417 U.S. 333 (1974), this Court considered a Section 2255 motion claiming that the defendant had been convicted for an act that the law did not make criminal, as established by an intervening decision interpreting substantive law. The Court held that such a claim was cognizable under Section 2255 as a statutory claim. 417 U.S. at 342-347. Davis, however, did not address whether a narrowing construction of a substantive criminal statute might support a constitutional claim on collateral attack as well.

the substantiality of petitioner's showing in this case, because it held that petitioner's reliance on Bailey failed to raise a constitutional claim. In our view, that basis for the court of appeals' decision is mistaken.

2. Although we believe that a remand is required to reconsider whether petitioner can make a "substantial showing of the denial of a constitutional right," no remand is needed to reconsider the threshold issue of whether petitioner was required to obtain a certificate of appealability. The petition does not ask this Court to review whether the certificate-of-appealability requirement applies in this case. In Lindh v. Murphy, 117 S. Ct. 2059 (1997), however, which was decided after the petition was filed, this Court concluded that Congress generally intended "to apply the [AEDPA] amendments to chapter 153 only to such cases as were filed after the statute's enactment." Id. at 2063, see id. at 2068. In so holding, the Court reasoned that the express provision that the Act's amendments to Chapter 154 of Title 28 "shall apply to cases pending," AEDPA § 107(c), implied that the Act's amendments to Chapter 153 of Title 28 should not apply to pending cases. Id. at 2063.

The Act's provision requiring a certificate of appealability for federal prisoners is an amendment to Chapter 153 of Title 28; accordingly, under Lindh, that provision does not apply to "cases pending" on April 24, 1996, the effective date of the Act. The facts of Lindh, however, did not involve a petition for post-conviction relief in which the appeal was filed after the effective

date of the Act. See id. at 2061-2062. And the Court did not address whether, for purposes of the applicability of the certificate-of-appealability requirement, the "case" that has to be pending on the effective date of the Act is the "case" on appeal or the original "case" filed in the district court. In this instance, petitioner's motion for relief was filed in the district court before the effective date of the Act, but his case on appeal was filed after the effective date of the Act. We believe that such a case is subject to the Act's certificate of appealability requirement because the appeal -- the relevant case -- was neither "filed" nor "pending" on April 24, 1996.[4]

In Tiedeman v. Benson, No. 96-3977, 1997 WL 437181 (August 6, 1997), the Eighth Circuit recently agreed that a certificate of appealability is required whenever the notice of appeal was filed after the effective date of the Act, and that Lindh does not require otherwise. Tiedeman attempted to appeal from a district court order denying his petition for habeas corpus. Before the court of appeals, Tiedeman contended that Section 2253(c)(1)'s certificate-of-appealability requirement did not apply in his case because he had filed his petition for habeas corpus in the district

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[4] The Court has denied certiorari in five cases in which courts of appeals applied the certificate of appealability requirement to cases (like this one) that were pending in the district court on the effective date of the Act, but in which a notice of appeal was not filed until after that date. Matthews v. United States, No. 96-8310, cert. denied, 117 S. Ct. 2485 (1997); Zarnes v. United States, No. 96-1324, cert. denied, 117 S. Ct. 1842 (1997); Durham v. United States, No. 96-7329, cert. denied, 117 S. Ct. 1699 (1997); England v. United States, No. 96-6826, cert. denied, 117 S. Ct. 969 (1997); Travis v. United States, No. 96-6585, cert. denied, 117 S. Ct. 968 (1997).

court before the enactment of the AEDPA.[5] 1997 WL 437181 at *3. The court of appeals disagreed. It distinguished Lindh on the ground that the particular provision at issue in that case involved "substantive standards for review of state-court judgments by habeas courts." Ibid. Moreover, the court continued, "we can think of no reason why a new provision exclusively directed towards appeal procedures would depend for its effective date on the filing of a case in a trial court, instead of on the filing of a notice of appeal or similar document." Ibid. Accordingly, the court of appeals concluded that the certificate-of-appealability requirement applied to Tiedeman because his notice of appeal was filed after the Act's effective date. Ibid. Because the Eighth Circuit has already concluded that the certificate-of-appealability requirement applies where, as here, the notice of appeal was filed after the effective date of the Act, no remand is required for reconsideration in light of Lindh.

We recognize that three courts of appeals have held, since Lindh, that the certificate-of-appealability requirement does not apply to petitions for post-conviction relief that were filed in the district court before the effective date of the Act. United States v. Carter, 117 F.3d 262, 264 (5th Cir. 1997) (holding that "[f]ollowing Lindh, * * * § 2255 appellants are not subject to this [certificate-of-appealability] requirement unless their § 2255

[5] 28 U.S.C. 2253(c)(1)(A) requires a certificate of appealability to appeal from "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court."

petitions were filed in the district court after the AEDPA's effective date of April 24, 1996."); Nelson v. Walker, No. 96-2354, 1997 WL 442686 (2d Cir. August 7, 1997) (holding that the requirement in 28 U.S.C. 2253(c)(3) (as amended) that the certificate of appealability identify which issue(s) merit appeal under Section 2253(c)(2) does not apply to an appeal from denial of a habeas petition filed before the Act's effective date); Arredondo v. United States, Nos. 96-2126/2583, 1997 WL 459716 (6th Cir. August 13, 1997) (holding that appellant whose Section 2255 motion was pending on the effective date of the Act is not required to obtain a certificate of appealability); but cf. Letter dated July 17, 1997 from Leonard Green, Clerk, to United States, Handy v. United States, No. 96-2594 (6th Cir.) (directing the government to respond to a petition for rehearing en banc on the issue whether "§ 2255 petitioners are subject to the certificate of appealability requirement of the [AEDPA] if their § 2255 petitions were filed in the district court before April 24, 1996, when the Act became effective."). That disagreement, however, concerns an issue that is of rapidly diminishing importance, will affect the outcome in only a handful of cases, and is unlikely, in our view, to be determinative of the appeal in this case. Accordingly, this Court's review of the applicability of Lindh to a case in the procedural posture presented here is not warranted.

3. Because this case should be remanded, this Court need not address any of the additional issues identified by petitioner. First, this Court need not consider at this juncture petitioner's

claim that the language in Section 2253(c)(2), requiring a "substantial showing of the denial of a constitutional right," should be read to permit appeals of statutory claims. Pet. 13-19.

Second, petitioner's challenge to the district court's conclusion that petitioner had "waived" his claim by failing to raise it on direct appeal is not ripe. The court of appeals did not address that holding in its order denying a certificate of appealability. The court of appeals may reach that claim on remand, however, because a defendant whose constitutional claim is procedurally barred cannot prevail on the merits or make a "substantial showing of the denial of a constitutional right." Tucker v. Johnson, No. 97-20101, 1997 WL 367348 at *4 (5th Cir. 1997) (denying certificate of probable cause where petitioner cannot show that she can overcome her procedural default).[6]

Third, certiorari is not appropriate to consider whether petitioner's conduct constituted a "carrying" under Section 924(c) or whether the jury instructions at his trial misstated the law. Pet. 29-39, 39-40. Those fact-bound issues were not considered by

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[6] The district court based its waiver holding on a decision that was subsequently vacated and remanded by this Court, and in which the court of appeals granted relief on remand. See pp. 4-5, supra. Moreover, the government recently filed a confession of error in this Court in Bousley v. Brooks, 97 F.3d 284 (8th Cir. 1996), petition for cert. pending, No. 96-8516. In that case, the court of appeals held that a challenge under Bailey was barred by procedural default rules. In our view, the court of appeals erred by concluding its analysis without considering whether the defendant could make a sufficient showing of "actual innocence." Brief for the United States in Bousley v. Brooks, No. 96-8516, at 9-11. On remand, the court of appeals would be free to consider those developments in reviewing the district court's waiver holding.

either the district court or the court of appeals, and they accordingly do not warrant review by this Court in the first instance.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of the position asserted in this brief.

Respectfully submitted.

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AUGUST 1997

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

HOHN, ARNOLD F. Petitioner	)	
vs.	)	No. 96-8986
USA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES** by first class mail, postage prepaid, on this 18th day of August 1997.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

CONCLUSION 10

TABLE OF AUTHORITIES

Pages

Cases:

Arredondo v. *United States*, 1997 WL 459716 (6th Cir. Aug. 13, 1997) 9

Bailey v. *United States*, 116 S. Ct. 501 (1995) 2-6

Barefoot v. *Estelle*, 463 U.S. 880 (1983) 4, 6

Hardwick v. *Singletary*, 1997 WL 555715 (11th Cir. Sept. 4, 1997) 9

Jackson v. *Virginia*, 443 U.S. 307 (1979) 2

Koo v. *McBride*, 1997 WL 549557 (7th Cir. Sept. 3, 1997) 9

Lindh v. *Murphy*, 117 S. Ct. 2059 (1997) 1, 7-9

Nelson v. *Walker*, 1997 WL 442686 (2d Cir. Aug. 7, 1997) 9

Stromberg v. *California*, 283 U.S. 359 (1931) 3, 4

Tiedman v. *Benson*, 1997 WL 437181 (Aug. 6, 1997) 8

United States v. *Carter*, 117 F.3d 262 (5th Cir. 1997) 9

United States v. *Gaudin*, 115 S. Ct. 2310 (1995) 2, 3

United States v. *Gutierrez*, 1997 U.S. App. LEXIS 17430 (10th Cir. July 11, 1997) (unpublished opinion) 9

United States v. *McKinney*, 1997 U.S. App. LEXIS 17912 (8th Cir. July 16, 1997), on remand, 117 S. Ct. 1544 (1997) 6, 7

United States v. *Ryan*, 41 F.3d 361 (8th Cir. 1994) (en banc) 3

Yates v. *United States*, 354 U.S. 298 (1957) 3, 4

Statutes:

18 U.S.C. § 924(c) 3-6

28 U.S.C. § 2253(c)(2) 1, 2, 5, 7

REPLY BRIEF FOR PETITIONER

The parties in this case are now in agreement: petitioner's claim that he is incarcerated for conduct that does not constitute a crime "may fairly be characterized as 'constitutional,' and * * * the court of appeals erred in concluding otherwise." U.S. Br. 7. After confessing error on the primary point in dispute, however, the government suggests a remand to determine whether petitioner Hohn can make a "substantial showing" within the meaning of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2253(c)(2), concerning his admittedly constitutional claim. For three reasons, a remand for that purpose is unnecessary and the Court should enter an order summarily reversing the decision below.

First, with respect to one of the two constitutional grounds for relief advanced by Hohn, the government fails to provide any reason (and there is none) why the extensive showing already made in Hohn's petition for certiorari might fail to qualify as "substantial." Second, although the government mentions a theory under which claimants who advance arguments analogous to Hohn's second constitutional challenge might fail to make the "substantial showing" required to obtain a certificate of appealability, it cannot bring itself to suggest that *Hohn himself* falls within this category (and he does not). And finally, after Hohn's petition for certiorari was filed, this Court issued its decision in *Lindh* v. *Murphy*, 117 S. Ct. 2059, 2063 (1997), which conclusively establishes that AEDPA's certificate-of-appealability requirement may not be applied retroactively to this case. For all of these reasons, this Court, in light of the government's confession of error, should summarily reverse the Eighth Circuit's decision and remand with instructions to the court of appeals to proceed to the merits of petitioner's appeal.

I

As explained in the petition (at 33-34), Hohn is presently incarcerated for conduct that this Court unanimously held in *Bailey* v. *United States*, 116 S. Ct. 501 (1995), is not a federal crime. The government admits that Hohn's continued incarceration could violate the Constitution in at least two different ways. First, "[a] contention that, in light of *Bailey*, the evidence was insufficient to support a conviction under Section 924(c)(1) may state a claim under the Due Process Clause." See U.S. Br. 8 (citing *Jackson* v. *Virginia*, 443 U.S. 307, 313-16 (1979)). Second, "[a] contention that the jury instructions failed to require the jury to make findings on every essential element of the offense under Section 924(c), as construed in *Bailey*, may state a claim under the Fifth and Sixth Amendments." U.S. Br. 8 (citing *United States* v. *Gaudin*, 115 S. Ct. 2310, 2320 (1995)). The government acknowledges that Hohn has "raised claims of both varieties." *Ibid.*

These concessions should definitively resolve in petitioner's favor the first question presented in the petition for certiorari. The government professes to harbor doubts, however, as to whether "[c]laims of the sort that petitioner raised * * * satisfy Section 2253(c)(2)'s requirement of a '*substantial* showing of the denial of a constitutional right.'" U.S. Br. 9 (quoting 28 U.S.C. § 2253(c)(2)) (emphasis in government's brief). Of course, in order to justify a remand for consideration of the question of substantiality, the government would need to show that some doubt exists on the substantiality question with respect to both constitutional violations. The government, however, has not even attempted to make such a showing.

A. This Court has recently reaffirmed the principle that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of

every element of the crime with which he is charged." *United States* v. *Gaudin*, 115 S. Ct. 2310, 2320 (1995). As we have shown (Pet. 29-30 & n.21, 39-40), the jury instructions on the 18 U.S.C. § 924(c) count at Hohn's trial grossly misstated the law, and Hohn was accordingly deprived of his constitutional right to have a jury determine his guilt beyond a reasonable doubt of every element of that crime. The jury was charged that

> [t]he phrase "used a firearm" means *having a firearm available* to aid in the commission of possession of Methamphetamine with intent to distribute. Similarly, the phrase "carried a firearm" *does not require proof of actual possession* of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was *available to provide protection* in connection with the possession of Methamphetamine with intent to distribute or facilitate success.

Pet. App. 31a (emphasis added). The government itself conceded below (see Pet. 5, 30 n.21, 34 n.24, 39; Pet. App. 23a) that this instruction allowed the jury to convict Hohn of "using a firearm" under a definition of that crime that is manifestly erroneous in light of *Bailey*.

Although we contend that the jury instructions' definition of "carrying a firearm" is similarly unsupportable (Pet. 39-40), it is important to bear in mind that Hohn's constitutional rights would be violated *even if the "carrying" instruction were entirely proper*. As the Eighth Circuit, sitting en banc, has explained, "a verdict based on jury instructions that provided alternative bases for a finding, one of which is legally inadequate, is presumed to have rested on the insufficient basis." *United States* v. *Ryan*, 41 F.3d 361, 365 (1994). Indeed, that is the holding of this Court's decisions in *Yates* v. *United States*, 354 U.S. 298, 312 (1957), and *Stromberg* v. *California*, 283 U.S. 359, 368 (1931). Not surprisingly, the government makes no attempt to dispute this controlling principle of law, or to suggest that it is inapplicable here. Thus, under established law it must be presumed that Hohn is currently incarcerated for "using

a firearm" even though no jury has ever found beyond a reasonable doubt that his conduct violated 18 U.S.C. § 924(c), as construed by this Court in *Bailey*.

The government concedes (U.S. Br. 8) that Hohn's claim based on the erroneous jury instruction for "using a firearm" qualifies as a claim under the Fifth and Sixth Amendments. Significantly, though, the government offers not the slightest hint of a reason why Hohn has failed to make a "substantial showing" with respect to this constitutional claim. The reason is simple: Hohn's unanswered and undisputed arguments in the petition for certiorari easily satisfy the "substantial showing" standard, which, as the government itself is constrained to admit (U.S. Br. 9), requires no more than a demonstration that the issues are "debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are *adequate to deserve encouragement to proceed further*." *Barefoot* v. *Estelle*, 463 U.S. 880, 893 n.4 (1983) (internal quotation marks omitted) (emphasis added). Hohn's arguments based on the concededly erroneous "use" instruction and the *Stromberg-Yates* principle amount to much more: they conclusively demonstrate that Hohn *is entitled to relief*.

Although this should be enough to warrant a summary reversal, there is more. The government also pointedly fails to suggest that Hohn has not made a "substantial showing" that the "carrying" instruction given at his trial was legally defective. Here again, the reason is straightforward: the petition for certiorari (Pet. 39-40) clearly demonstrates that the "carrying" instruction largely mirrored the "use" instruction and thus was invalid under *Bailey*. There

being no dispute about the substantiality of Hohn's showing concerning either of his Fifth and Sixth Amendment claims, summary reversal is warranted.[1]

B. As we previously explained (Pet. 34-39), there is a second, independent ground for Hohn's constitutional challenge to his continued incarceration: the evidence presented at his trial was insufficient to support a conviction under Section 924(c)(1). The government acknowledges (U.S. Br. 8) that this shortcoming gives rise to a claim under the Due Process Clause. With respect to *this* constitutional challenge, the government does at least articulate a reason why — in the government's carefully chosen words — "[c]laims *of the sort* that petitioner raised do not *automatically* satisfy" the "substantial showing" requirement of Section 2253(c)(2). U.S. Br. 9 (emphasis added). The government states that "a claim under Section 924(c) that the evidence was insufficient to show a 'use' of a firearm in light of *Bailey* would not constitute a substantial showing of the denial of a constitutional right absent an indication that the evidence was insufficient to show a 'carrying.'" U.S. Br. 9.

Whatever the truth of these generalizations, they have no bearing on this case. It may well be that "[c]laims *of the sort* that petitioner raised" concerning the sufficiency of evidence in his case "do not *automatically* satisfy" the "substantial showing" requirement. But the issue here is whether there is any reason to think that *Hohn's claim* is not supported by a "substantial showing." Tellingly, the government cannot even bring itself to say that Hohn's sufficiency argument, as set forth in detail in our certiorari petition, is not "debatable among jurists of

[1] The government's statement that the retroactivity of AEDPA's certificate-of-appealability requirement is "unlikely * * * to be determinative of the appeal in this case" (U.S. Br. 13) is highly illuminating. It indicates that the government harbors no real doubt that Hohn will easily qualify for a certificate of appealability on remand, if he is required by this Court to secure one from the court of appeals.

reason" and does not present "questions [that] are adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S. at 893 n.4. In the absence of even an assertion by the government that *Hohn* has failed to make a substantial showing concerning his sufficiency argument, there is no good reason to remand this issue to the court of appeals.

The government's reluctance to assert that Hohn has failed to make such a "substantial showing" is unsurprising, as such an assertion would be wholly implausible. As we explained at length in the ~etition for certiorari (at 35-41), the evidence was woefully insufficient to show beyond a reasonable doubt that Hohn violated Section 924(c) by "carrying" a firearm "during" the predicate offense. Indeed, we are aware of no post-*Bailey* decision of any court of appeals under which the facts of this case would support a conviction for "carrying" a firearm under Section 924(c).

Any doubt about the outcome in the Eighth Circuit, moreover, has been erased by that court's recent decision in *United States* v. *McKinney*, 1997 U.S. App. LEXIS 17912 (8th Cir. July 16, 1997), on remand, 117 S. Ct. 1544 (1997).[2] In *McKinney*, the defendant had been convicted of using or carrying a firearm under Section 924(c) based on the following facts:

> McKinney kept several guns in his heavily fortified compound in a room from which he monitored video cameras that were placed strategically so as to allow him to observe anyone approaching his building. As the government puts it in its supplemental brief, "the four assault weapons from the control room formed the basis for defendant's conviction under 18 U.S.C. § 924(c)" because he was operating "an armed drug fortress" on the day that he was raided.

[2] Not only does *McKinney* establish that there was insufficient evidence that Hohn "carried" a firearm, it also repudiates the Eighth Circuit's misguided waiver doctrine (upon which the district court relied in denying Hohn relief). See Pet. 20-27. Thus, after *McKinney* there can be no serious question *both* that Hohn is actually innocent of the federal crime for which he is currently serving time *and* that the district court's reasons for denying him relief were legally erroneous.

1997 U.S. App. LEXIS 17912, at *3. The Eighth Circuit concluded that these facts did not support a conviction under Section 924(c) either for "using" or for "carrying" a firearm. In fact, the court of appeals stated that it was *plain error* for the trial court to submit the case to the jury on the "carrying" theory, because "[h]aving a gun available for use, even an immediate use, is simply not the equivalent of carrying it." *Id.* at *5; see also *id.* at *4-*5 ("In all of the cases in which we have upheld convictions for carrying guns during or in relation to a drug-trafficking offense, the defendant has had the weapon either in a car's hatchback, in the passenger compartment of a car, or on his person, and was thus carrying the offending weapons in an obvious, literal way."). If it was plain error for the district court to submit a "carrying" charge to the jury in *McKinney*, the same is true *a fortiori* in this case.

Because Hohn has easily made a "substantial showing" with respect to his Due Process Clause claim concerning the insufficiency of evidence that he "carried" a firearm, a remand to the court of appeals for a resolution of that issue is unnecessary.[3] For this reason as well, summary reversal is warranted.[4]

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[3] Of course, summary reversal on the appealability issue would not preclude the government from raising the "carrying" point at the merits stage of petitioner's appeal.

[4] In urging the Court not to grant plenary review on the waiver issue presented in Hohn's petition (Pet. 21-30), the government states in passing that "a defendant whose constitutional claim is procedurally barred cannot prevail on the merits or make a substantial showing of the denial of a constitutional right." U.S. Br. 14 (internal quotation marks omitted). Here again, the government does not come right out and say that *Hohn* would fail to make a "substantial showing" with respect to his constitutional claims because those claims have been waived. In any event, that argument would be completely untenable because, as previously explained (at note 2), the Eighth Circuit in *McKinney* has repudiated the indefensible waiver doctrine on which the district court based its erroneous decision to deny Hohn relief.

II

After the petition for certiorari was filed, this Court issued its decision in *Lindh* v. *Murphy*, 117 S. Ct. 2059 (1997). *Lindh* held that AEDPA's amendments to Chapter 154 of Title 28 (which includes Section 2253(c), the provision requiring certificates of appealability) do not apply to cases that were pending on the date AEDPA was signed into law. 117 S. Ct. at 2063. The government acknowledges, as it must, that this is the clear holding of *Lindh*. See U.S. Br. 10 ("[U]nder *Lindh*, that provision [requiring certificates of appealability] does not apply to 'cases pending' on April 24, 1996, the effective date of the Act."). The government further admits that "petitioner's Section 2255 motion was *pending* in the district court" on "April 24, 1996." U.S. Br. 5 (emphasis added). Rather than draw from these two concessions the inexorable conclusion that AEDPA has no application to this case, however, the government maintains that *Lindh* is not controlling and, even more remarkably, urges this Court to limit Hohn's ability to argue otherwise on remand to the Eighth Circuit. The government's request for a limitation on any remand order should be rejected out of hand. Indeed, this Court's decision in *Lindh* provides yet another reason why summary reversal is appropriate.

According to the government (U.S. Br. 10-11), this Court's holding in *Lindh* that AEDPA's amendments to Chapter 154 of Title 28 apply only to "cases pending" on the date AEDPA was enacted is not controlling here because the appellate phase of the proceedings below qualifies as a different "case" from the trial phase. Since what the government calls the "case on appeal" was commenced only *after* the passage of AEDPA (with the filing by Hohn of a notice of appeal), it does not matter, says the government, that Hohn's request for Section 2255 relief was pending in the district court before the statute's enactment. The government cites no

authority to support the novel proposition that the appellate phase of litigation constitutes a separate "case," and our research has uncovered none. Indeed, the only circuit that has adopted the government's position — the Eighth Circuit in *Tiedman* v. *Benson*, 1997 WL 437181 (Aug. 6, 1997) — did so not because the appellate phase constitutes a different "case" but because it could "think of no reason why a new provision exclusively directed towards appeal procedures would depend for its effective date on the filing of a case in a trial court." *Id.* at *6. The dispositive "reason," of course, is supplied by this Court's decision in *Lindh*. Not surprisingly, at least six circuits have concluded that no certificate of appealability is necessary under *Lindh* if the Section 2255 petition was filed in the district court prior to AEDPA's enactment. See *United States* v. *Carter*, 117 F.3d 262, 264 (5th Cir. 1997); *United States* v. *Gutierrez*, 1997 U.S. App. LEXIS 17430, at *2-*3 & n.1 (10th Cir. July 11, 1997) (unpublished opinion); *Nelson* v. *Walker*, 1997 WL 442686, at *14 (2d Cir. Aug. 7, 1997); *Arredondo* v. *United States*, 1997 WL 459716, at *2 (6th Cir. Aug. 13, 1997); *Koo* v. *McBride*, 1997 WL 549557, at *1-*2 & n.3 (7th Cir. Sept. 3, 1997); *Hardwick* v. *Singletary*, 1997 WL 555715, at *1-*2 (11th Cir. Sept. 4, 1997).

To correct the Eighth Circuit's obvious misreading of *Lindh*, and to bring it into line with the unanimous conclusion of other circuits, summary reversal is also warranted.[5]

[5] At a minimum, if the Court decides to vacate and remand for a determination of substantiality, it should not preclude Hohn from raising the *Lindh* argument. Although the government is correct in observing that the petition for certiorari "does not ask this Court to review whether the certificate-of-appealability issue applied in this case" (U.S. Br. 10), it is clear that the retroactivity question, which is jurisdictional, arose only after the certiorari petition was filed when this Court issued its decision in *Lindh*. See also S. Ct. Rule 14.1(a) (issues "fairly included" in questions presented may be considered).

CONCLUSION

The petition for a writ of certiorari should be granted, and the decision below summarily reversed and remanded with instructions to consider petitioner's appeal on the merits.

Respectfully submitted.

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In the Supreme Court of the United States

October Term, 1996

Arnold F. Hohn,
Petitioner,

v.

United States of America,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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18 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2

ARGUMENT 2

I. THE CIRCUIT COURT'S CONSTRUCTION OF §2253(c)(2) CANNOT BE RECONCILED WITH OTHER PROVISIONS OF THE AEDPA AND THE ACT AS A WHOLE 3

II. THE CIRCUIT'S CONSTRUCTION OF §2253(c)(2) RAISES SERIOUS CONSTITUTIONAL QUESTIONS 10

CONCLUSION 14

TABLE OF AUTHORITIES

Cases **Page**

Coleman v. United States,
106 F.3d 339 (10th Cir. 1997) 9
Davis v. Jacobs,
454 U.S. 911 (1981) 11
Felker v. Turpin,
116 S.Ct. 2333 (1996) 11
Herman v. Johnson,
98 F.3d 171 (5th Cir. 1996) 13
Hill v. United States,
368 U.S. 424 (1962) 4
In re Blackshire,
98 F.3d 1293 (11th Cir. 1996) 9
Lozada v. United States,
107 F.3d 1011 (2d Cir. 1997) 13
Nunez v. United States,
96 F.3d 990 (7th Cir. 1996) 9
Reed v. Farley,
512 U.S. 339 (1994) 4
Santana v. United States,
98 F.3d 752 (3d Cir. 1996) 13
United States v. Campos,
932 F. Supp. 1034 (W.D. Tenn. 1996) 13
United States v. Klein,
80 U.S. (13 Wall.) 128 (1871) 12
United States v. Lorentsen,
106 F.3d 278 (9th Cir. 1997) 9
United States v. Orozco,
103 F.3d 389 (5th Cir. 1996) 13
United States v. Sioux Nation of Indians,
448 U.S. 371 (1980) 12

Constitutional Provisions and Statutes

U.S. Const. art. III 10, 12-13
18 U.S.C. §924 2
28 U.S.C. §2241 4
28 U.S.C. §2244 ..... 4-5, 7-8
28 U.S.C. §2253 ..... passim
28 U.S.C. §2254 ..... 4-8, 12
28 U.S.C. §2255 ..... 1, 3-8, 11
28 U.S.C. §2262 6-8
28 U.S.C. §2264 7

INTEREST OF AMICUS*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL was founded over 35 years ago to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in the correctness and fairness of criminal convictions. Among NACDL's objectives are to promote the proper administration of justice and to ensure that statutes are construed and applied in accordance with due process.

Letters from the parties to this case expressing their consent to the filing of this brief are on file with the clerk.

*Counsel for neither party authored this *amicus curiae* brief, in whole or in part. No person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

QUESTIONS PRESENTED

1. Whether a federal prisoner who demonstrates that he is incarcerated for conduct that this Court conclusively determined does not constitute a federal crime has made "a substantial showing of the denial of a constitutional right" warranting issuance of a certificate of appealability under 28 U.S.C. §2255.

2. Whether a defendant's failure to raise an argument on direct appeal, when that argument was foreclosed by binding circuit precedent and had been uniformly rejected by other circuits, constitutes a knowing and intelligent "waiver," precluding any showing of "cause and prejudice" or other excuse for the procedural default in a collateral review proceeding.

3. Whether a defendant who possesses a firearm and drugs in close proximity to each other, but neither bears the firearm on his person, nor otherwise transports it, commits the crime under 18 U.S.C. §924(c) of "carr[ying]" a firearm "during and in relation to" the predicate offense of possession of the drugs with intent to distribute them.

STATEMENT OF THE CASE

The petition for certiorari accurately describes the circuit judgment this Court is asked to review.

ARGUMENT

This case is certworthy not only for the reasons the petitioner ably asserts, but for two other reasons as well. First,

the circuit court's construction of the adjective "constitutional" in §2253(c)(2), if accepted, would undermine the correct interpretation of other provisions in the AEDPA and, in the end, would frustrate an accurate, sensible, coherent interpretation of the Act as a whole. Second, the circuit court's construction raises serious constitutional questions.

Unfortunately, the circuit court below acted too quickly in a *pro se* case, looked only at a single term in a single provision of the new Act, jumped to an unwarranted conclusion regarding its meaning in the abstract, and made a serious mistake. That error should be corrected before it does further damage.

Since Congress enacted the AEDPA just over a year ago, the lower courts have wrestled with the meaning of the adjective "constitutional"—as that modifier is used by the Act in a variety of contexts. The pressure has mounted in recent weeks, as prisoners have rushed to meet the Act's new filing deadlines. Widespread difficulty and injustice will result if the system goes much longer without this Court's authoritative guidance on what is, in fact, a threshold question in many §2255 and habeas corpus cases. Not only petitioners' entitlement to appellate review, but many other crucial matters are at stake: the computation of filing deadlines and petitioners' right to evidentiary hearings and stays of execution.

I. THE CIRCUIT COURT'S CONSTRUCTION OF §2253(c)(2) CANNOT BE RECONCILED WITH OTHER PROVISIONS OF THE AEDPA AND THE ACT AS A WHOLE

Other key provisions of the Act also employ the adjective "constitutional." If that term is understood in those

instances to mean what the circuit court misconstrues it to mean in §2253(c)(2), the various working parts of the full Act cannot function, individually or together in an integrated system.

According to unamended language in §2255, a federal prisoner is entitled to seek relief on the ground that he or she is in custody under a sentence that was imposed in violation of the Constitution "or laws" of the United States, a sentence "in excess of the maximum allowed by law," or a sentence "otherwise subject to collateral attack." And according to similarly unamended text in §2241(c)(3) and §2254(a), a state prisoner is also entitled to seek habeas corpus relief on the ground that he or she is in custody in violation of the "laws" of the United States. Clearly, then, the new Act makes no attempt to banish federal nonconstitutional claims from the purview of federal collateral remedies.[1]

By the circuit court's account, however, the Act draws a clear constitutional/nonconstitutional distinction to control the way in which cases are processed after they enter the federal courthouse door. That position is untenable. The Act uses the "constitutional" designation in some contexts in which it cannot possibly mean to exclude nonconstitutional matters. Thus the Act plainly uses the modifier "constitutional" interchangeably with "federal" or, perhaps, as a synonym for "fundamental" or "cognizable."

Under a new provision in the Act, §2244(d)(1)(C), the

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[1] See *Hill v. United States*, 368 U.S. 424, 428 (1962) (explaining that fundamental nonconstitutional defects will suffice in 2255 cases); *Reed v. Farley*, 512 U.S. 339 (1994) (confirming that state prisoners can obtain habeas relief on a showing of serious violations of federal nonconstitutional law).

filing period for some habeas corpus petitions by state prisoners runs from the date on which the "constitutional right asserted was initially recognized." If the circuit court is correct in its construction of the adjective "constitutional" in §2253(c)(2), it follows that the same interpretation must be given to the "constitutional" modifier in §2244(d)(1)(C). Yet if the adjective "constitutional" in that provision is read to exclude nonconstitutional claims by negative implication, it must follow that the filing period is computed on the basis of an event that never occurs in some cases (i.e., cases in which the applicant attacks his or her conviction on federal nonconstitutional grounds). That, however, is a meaning that §2244(d)(1)(C) cannot sensibly bear.

Like §2244(d)(1)(C), §2255 (as amended by the Act) establishes a filing period for federal prisoners, which runs in some cases from the date on which a "right" is "newly recognized." In that instance, §2255 does not use the modifier "constitutional." If the appearance of the "constitutional" modifier in §2244(d)(1)(C) excludes nonconstitutional claims by implication, it follows that the omission of the same term from §2255 *includes* nonconstitutional claims. The result is that the filing period in §2255 cases must be geared to the establishment of nonconstitutional principles, while the parallel deadline for habeas petitions demands a purely constitutional footing. Those two provisions cannot sensibly be read to establish such an obvious inconsistency.

Another new provision, §2254(e), governs the federal courts' authority to conduct evidentiary hearings with respect to habeas petitions by state prisoners. Under subparagraphs (A)(i) and (B) of §2254(e)(2), prisoners who failed to develop the facts in state court can obtain a federal hearing to pursue "constitutional" matters—either claims that rely on new rules of "constitutional" law, or evidence that would have convinced

the jury to acquit,but for "constitutional" error.

If the circuit court's interpretation of the "constitutional" adjective in §2253(c)(2) is correct, it must follow that the same construction must be placed on that identical term in §2254(e)(2). That means, however, that state habeas corpus petitioners who advance perfectly cognizable nonconstitutional claims for relief (but failed to develop the relevant facts in state court) are out of luck in federal court—no matter how "new" a claim may be, no matter how difficult it would have been to discover its factual predicate when the case was before the state courts, and, indeed, no matter how closely the claim is linked to innocence. This, on the inconsistent theory that only purely "constitutional" claims need apply for fact-finding in federal court. That cannot be what §2254(e) means.

Any such reading of §2254(e) conflicts with settled law governing hearings in §2255 cases. The new Act's amendments to §2255 do not address hearings and thus leave previous law in this respect intact. Of course, federal district courts can conduct fact-finding hearings regarding nonconstitutional claims raised by federal prisoners.

Forbidding evidentiary hearings in habeas cases presenting nonconstitutional claims would also conflict with related provisions in Chapter 154 of the Act, which governs death penalty cases in qualifying states. Under §2264(b) of that new chapter, federal courts are expressly instructed to adjudicate prisoners' claims "subject to" §2254(e). Plainly, then, §2254(e) can bear only a construction that can be reconciled, in turn, with the provisions in Chapter 154.

Under §2262(b)(3), prisoners can sustain a stay of execution if they make a substantial showing of the denial of "a

Federal right." Here again, if the appearance of the adjective "constitutional" in §2253(c)(2) precludes nonconstitutional claims, it must follow that the omission of that modifer from §2262(b) *includes* nonconstitutional claims. That means, however, that §2262(b) permits a prisoner to preserve a stay of execution on the strength of a nonconstitutional claim, even as a sister provision of the same Act, §2254(e), systematically refuses claims of that nature a federal evidentiary hearing.

Under §2264(a)(2), prisoners who are subject to Chapter 154 can advance a claim based on a "new Federal right" (not necessarily "constitutional" in nature)—despite procedural default with respect to that claim in state court. And, under §2264(a)(3), prisoners can press newly discovered facts related to any "claim" (again, not necessarily "constitutional" in character). By the circuit court's account of the adjective "constitutional," however, nonconstitutional claims are systematically denied federal evidentiary hearings. If that view is accepted, it must follow that §2264 excuses a prisoner's default with respect to a nonconstitutional claim and, indeed, instructs a federal habeas court to adjudicate that claim on the merits, but (at the same time and by virtue of the same Act), §2254(e) bars the court from taking evidence regarding the claim. That cannot be what §2264(a) means.

Finally, under §2244(b)(2)(A), state prisoners can file a second or successive petition in some instances, provided they rely on a "new rule" of "constitutional" law. Similarly, under §2255, federal prisoners, too, can press "new rule" claims described as "constitutional." By the circuit court's account of the adjective "constitutional," those provisions must contemplate that prisoners face a blanket prohibition on nonconstitutional, but otherwise perfectly cognizable, claims—no matter how "new" they may be. That cannot be

what §2244(b)(2)(A) and §2255 mean.[2]

Consider in this connection that, with respect to innocence-related claims, the successive petition provision in §2255 omits any reference to the "constitutional" adjective. So prisoners who press a nonconstitutional claim are entitled to proceed—provided they link that kind of claim to innocence in the manner prescribed.[3] It is inconceivable, then, that in the same breath §2255 flatly bars successive petitions advancing "new rule" claims that are nonconstitutional in nature.

Since prisoners are now filing successive habeas petitions and §2255 motions that are controlled by the new Act, this is where the erroneous case law is developing most

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[2] Together, §2262(b)(3) and (c) have it that if a prisoner's claim is rejected, no other federal court can thereafter issue a stay—unless the prisoner meets the additional standards for filing a second or successive petition established by §2244(b). If, however, §2244(b) unilaterally excludes nonconstitutional claims, §2262 must mean that a stay can remain in place on the basis of a nonconstitutional claim, even though another court would be barred from issuing a new stay unless something purely "constitutional" is offered. That cannot be what §2262 means.

[3] This is scarcely surprising; a nonconstitutional claim touching innocence is an excellent candidate for a second or successive §2255 motion. Yet by allowing such a claim to be advanced in a successive motion, §2255 rejects any clean constitutional/nonconstitutional basis of distinction.

Of course, the AEDPA does establish restrictions on multiple collateral applications. The point is that those restrictions go not to the substantive claims that can be advanced, but rather to the abusive manner in which some prisoners attempt to proceed. They bar not federal claims of a particular (nonconstitutional) nature, but federal claims of any nature—if those claims are pressed in needlessly repetitive collateral actions.

rapidly—much of it explicitly in reliance on the Eighth Circuit's misconstruction of the modifier "constitutional" in this case.[4]

To sum up, the circuit's interpretation of the adjective "constitutional" ascribes to the AEDPA a purpose to create a series of arbitrary, Byzantine snarls in the federal courts' handling of claims that plainly are cognizable in collateral proceedings. By the circuit's account, a petitioner who advances a purely "constitutional" claim is free to file a collateral petition, so long as he meets one of the filing deadlines established by the Act, and is equally entitled to federal fact-finding, a stay of execution, and (if necessary) appellate review—provided he meets the standards prescribed for those ordinary tools of effective adjudication.

By contrast, according to the circuit, a petitioner who advances a nonconstitutional claim faces an entirely different landscape. He is free to file a petition, but he must meet a filing deadline that takes no account of how recently his claim materialized. This is so not because anyone thinks the petitioner should have anticipated a "new" nonconstitutional claim, but only because his claim is, by nature, nonconstitutional. If the facts supporting his claim were not developed in state court, the petitioner cannot obtain a federal hearing even if he meets the standards the Act establishes for determining whether procedural default in state court should be excused. This is so not because anyone thinks that the petitioner could have developed the facts previously, but only

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[4] E.g., *Coleman v. United States*, 106 F.3d 339 (10th Cir. 1997); *United States v. Lorentsen*, 106 F.3d 278 (9th Cir. 1997); *In re Blackshire*, 98 F.3d 1293 (11th Cir. 1996); *Nunez v. United States*, 96 F.3d 990 (7th Cir. 1996).

because his claim is nonconstitutional in character. If the petitioner needs a stay of execution, he may get one. But the district court may be unable to hold a hearing to determine his claim responsibly—again, only because the claim falls in the nonconstitutional category. Finally, of course, if the district court rules unfavorably, the petitioner is barred from seeking appellate review—again, not because anyone has concluded that his claim is frivolous and does not warrant appellate consideration, but because it is nonconstitutional in nature.

Such an internally inconsistent maze of arbitrary traps is nothing to ascribe to the United States Congress or a new statute meant to bring good sense, order, and efficiency to the system. The AEDPA may not be perfect. But it is not Catch 22.

The only sensible construction that can be placed on the Act is that it employs the adjective "constitutional" to denote matters that are cognizable in federal collateral proceedings—not formalistically to foreclose matters that are cognizable, but are nonetheless nonconstitutional in character. The reason is plain enough. The primary purpose of the Act is to make federal habeas litigation more efficient, virtually all the claims raised by state prisoners *are* constitutional in nature, and the Act simply employs that designation because it is usually accurate.

II. THE CIRCUIT'S CONSTRUCTION OF §2253(c)(2) RAISES SERIOUS CONSTITUTIONAL QUESTIONS

Just as it makes sense to construe the AEDPA in a way that avoids irrational, freakish results, it equally makes sense to read the new Act in a way that avoids serious constitutional questions under Article III. Yet the circuit court's

interpretation bristles with constitutional difficulty. By the circuit court's account of §2253(c)(2), all prisoners, state and federal, can press nonconstitutional claims at the district level, but not higher. District court judgments on nonconstitutional federal claims are, then, effectively final in some instances.

Making a single district judge the sole arbiter of nonconstitutional federal claims would not only be novel. It would invite serious constitutional objections. Appellate review at the circuit level and, indeed, in this Court, serves both to correct errors below and to ensure a uniform interpretation of federal law. If, in habeas and §2255 cases involving nonconstitutional claims, district court judgments are invulnerable to review, both those values are sacrificed. In the case of §2255 motions, the claims at stake were not typically available at trial or on appeal, but are entirely fresh—cognizable for the first time in collateral proceedings. Making district court judgments final with respect to claims of that kind places the responsibility of giving federal law its authoritative interpretation in the hands of a single individual.[5]

Moreover, the arrangement the circuit court ascribes to §2253(c)(2) is not outcome-neutral. For §2253 does not require the respondent (i.e., the state or the federal government) to obtain a certificate before appealing a judgment *in the prisoner's favor*. If §2253 permits government appeals in cases

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[5] This Court might still reach down for a case by some extraordinary means—perhaps its jurisdiction to entertain habeas petitions as an "original" matter, see *Felker v. Turpin*, 116 S.Ct. 2333 (1996), or its authority under the All-Writs Act to issue the common law writ of certiorari. See *Davis v. Jacobs*, 454 U.S. 911 (1981). Yet the formal availability of that kind of avenue in an extraordinary case scarcely defuses the problems that would attend making district court judgments final in an entire category of cases.

involving nonconstitutional claims, but precludes prisoner-initiated appeals, this newly amended statute skews the results that Article III courts can reach on federal issues. Errors that favor prisoners are subject to review and may be corrected, but errors that favor the government are insulated from review and may stand. That kind of legislative manipulation of judicial outcomes has been invalid for over a century.[6]

Nothing of this sort occurred prior to the circuit court's extraordinary construction of the AEDPA's amendment to §2253. Before the amendment, disappointed habeas petitioners proceeding under §2254, but not governmental respondents, were required to obtain a certificate as a condition for appellate review. Yet at that time §2253 did not employ the "constitutional" adjective and thus established only a merits-related screening test to ensure that prisoners did not advance frivolous claims (of any cognizable nature) on appeal. That regime was one-sided, to be sure, but it insulated the appellate courts from meritless claims—not an entire category of cognizable claims, irrespective of their merit. Gatekeeping devices that detect worthless claims are familiar and perfectly valid. The arrangement the circuit court's judgment here reflects is not of that order.

It is one thing to require prisoners to show some baseline substance to their appellate claims before allowing them to proceed, but to assume that state officials will police themselves. It is quite another to refuse to allow prisoners to advance plainly meritorious claims merely because those

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[6] *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 404 (1980)(explaining that *Klein* faulted a statute that forced this Court to decide a case in the government's favor).

claims are nonconstitutional in nature, but to open the federal appellate courts' doors in the same kind of case—if the warden, rather than a prisoner in gaol, comes knocking. Yet that is precisely the perverse arrangement the circuit court envisions.

The circuit court below held that certificates cannot be issued with respect to nonconstitutional claims. Other courts have indicated agreement, yet without significant discussion and certainly without explicit attention to the constitutional issues.[7] Still other courts have hesitated to follow suit—sensing, perhaps, the serious Article III problems that such a construction of the Act entails.[8]

The situation thus invites this Court's attention, lest inconsistent judgments build up in short order, many of them erroneous, raising even more (equally difficult) problems to resolve. A new statute like the AEDPA may require time for the bugs to be sorted out. In this instance, however, the lower courts will flounder over fundamental constitutional issues at the very threshold of many cases—unless and until they receive this Court's guidance.

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[7] E.g., *Lozada v. United States*, 107 F.3d 1011 (2d Cir. 1997)(accepting the Eighth Circuit's premise that nonconstitutional claims are excluded—but without elaboration in a case in which the parties did not dispute the question). Cf. *United States v. Orozco*, 103 F.3d 389 (5th Cir. 1996)(intimating agreement).

[8] E.g., *Santana v. United States*, 98 F.3d 752, 757 (3d Cir. 1996)(expressly foregoing a decision on whether the reference to "constitutional" claims excludes nonconstitutional claims); *Herman v. Johnson*, 98 F.3d 171 (5th Cir. 1996)(avoiding the issue by finding a prisoner's showing insufficient irrespective of whether his claim was nonconstitutional in nature). Cf. *United States v. Campos*, 932 F. Supp. 1034, 1038 (W.D. Tenn. 1996)(clearly recognizing that the term "constitutional" appears in the new provision but nonetheless treating the language of the new and the old law to be "exactly" the same).

CONCLUSION

For the reasons given above, the Court should grant the petitioner's petition for review and should reverse the circuit court's judgment.

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In The

Supreme Court of the United States

October Term, 1996

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICUS CURIAE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal prisoner who demonstrates that he is incarcerated for conduct that this Court conclusively determined does not constitute a federal crime has made "a substantial showing of the denial of a constitutional right" warranting issuance of a certificate of appealability under 28 U.S.C. § 2255.

2. Whether a defendant's failure to raise an argument on direct appeal, when that argument was foreclosed by binding circuit precedent and had been uniformly rejected by other circuits, constitutes a knowing and intelligent "waiver," precluding any showing of "cause and prejudice" or other excuse for the procedural default in a collateral review proceeding.

3. Whether a defendant who possesses a firearm and drugs in close proximity to each other, but neither bears the firearm on his person, nor otherwise transports it, commits the crime under 18 U.S.C. § 924(c) of "carr[ying]" a firearm "during and in relation to" the predicate offense of possession of the drugs with intent to distribute them.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
BRIEF OF AMICUS	1
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Bailey v. United States, 116 S. Ct. 501 (1995) ..... *passim*

Burks v. United States, 437 U.S. 1 (1978) 6

Davis v. United States, 411 U.S. 233 (1973) 4

Davis v. United States, 417 U.S. 333 (1974) 4, 7, 8

Engle v. Isaac, 456 U.S. 107 (1982) 12

Hohn v. United States, 99 F.3d 892 (8th Cir. 1996) ...6, 7

Hudson v. Louisiana, 450 U.S. 40 (1981) 6

Hunter v. Bailey, 101 F.3d 1565 (11th Cir. 1996) 9

In re Burwell, 350 U.S. 521 (1956) 3

In re Winship, 397 U.S. 358 (1970) 6

Jackson v. Virginia, 443 U.S. 307 (1979) 4, 7

Lindh v. Murphy, 138 L. Ed. 2d 481 (1997) 3, 10

Mullaney v. Wilbur, 421 U.S. 684 (1975) 6

Murray v. Carrier, 477 U.S. 478 (1986) 12

Reed v. Ross, 468 U.S. 1 (1984) 12

Santana v. United States, 98 F.3d 752 (3d Cir. 1996) 9

Schlup v. Delo, 115 S. Ct. 851 (1995) 12

Smith v. Murray, 477 U.S. 527 (1986) 12

United States v. Eyer, 113 F.3d 470 (3d Cir. 1997) 7

United States v. Frady, 456 U.S. 152 (1982) 4

United States v. Kozminski, 487 U.S. 931 (1988) 6, 7

TABLE OF AUTHORITIES – Continued

Page

United States v. Lozada, 107 F.3d 1011 (2d Cir. 1997) 10

United States v. McKinney, 79 F.3d 105 (8th Cir. 1996), *vacated*, No. 96-6348, 1997 U.S. LEXIS 3099 (U.S. May 19, 1997), *on remand*, No. 95-2132, 1997 U.S. App. LEXIS 17912 (8th Cir. July 16, 1997) 4, 5, 9, 11, 12

United States v. McPhail, 112 F.3d 197 (5th Cir. 1997) 8

United States v. Orozco, 103 F.3d 389 (5th Cir. 1997) 10

STATUTES AND RULES

18 U.S.C. § 924(c) ..... *passim*

28 U.S.C § 2244(b)(3)(B) 3

28 U.S.C. § 2253(c) ..... *passim*

28 U.S.C. § 2255 ..... *passim*

4th Cir. R. 22(a) 3

proposed 3d Cir. R. 22.3 3

BRIEF FOR FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICUS CURIAE IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION (FAMM) files this *amicus* brief pursuant to this Court's Rule 37.2(a) in support of Arnold Hohn's petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.[1] Both petitioner and respondent have granted *amicus* consent to file this brief, and letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICUS

FAMM is a nonprofit, nonpartisan, educational organization that conducts research and advocacy regarding the cost of mandatory minimum sentencing in terms of public expenditures, perpetuation of unwarranted and unjust sentencing disparities, and the transfer of the sentencing function from the judiciary to the prosecution. Founded in 1991, FAMM has over 33,000 members nationwide with 30 chapters in 24 states and the District of Columbia. FAMM conducts sentencing workshops for

[1] Counsel for neither party authored this brief in whole or in part. No person or entity, other than the *amicus* FAMM, made a monetary contribution to the preparation or submission of this brief.

its members, publishes a newsletter, serves as a sentencing clearinghouse for the media, and researches sentencing cases for *pro bono* litigation. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime.

FAMM is deeply concerned about the injustice wrought by the mandatory minimum statute under which Arnold F. Hohn was convicted, 18 U.S.C. § 924(c). Before *Bailey v. United States*, 116 S. Ct. 501 (1995), untold hundreds of prisoners received mandatory five-year sentences for lawful conduct. Prisoners such as petitioner Hohn remain incarcerated; others, like Herman McGee, have found courts responsive to their plight. *United States v. Herman McGee*, No. 90-137CR(3) (E.D. Mo.). Mr. McGee lawfully kept five guns in his home when he was arrested for cocaine. Although no drugs were found and no evidence suggested the guns were used or carried or connected to the cocaine offense, Mr. McGee was convicted of violating § 924(c) and sentenced to five consecutive five-year sentences. The district court judge questioned, as have most federal judges, the wisdom of shifting sentencing discretion from the judiciary to the prosecution. After this Court handed down *Bailey*, Mr. McGee's conviction was vacated and his sentence reduced by twenty-five years. FAMM submits this brief on behalf of all prisoners still serving mandatory minimum sentences for conduct that is not a crime.

SUMMARY OF ARGUMENT

A federal prisoner whose motion to vacate sentence under 28 U.S.C. § 2255 has been denied is entitled to appeal if a single district or circuit judge, or the Circuit Justice, finds that the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).[2] The circuit court below wrongly concluded that petitioner had not made such a showing, despite his conviction under 18 U.S.C. § 924(c) for conduct this Court held in *Bailey v. United States*, 116 S. Ct. 501 (1995), did not violate that statute.

Petitioner's *pro se* § 2255 motion, liberally read, presented the claim that petitioner was convicted without proof beyond a reasonable doubt (or, indeed, any proof at all) that he was guilty of violating § 924(c), properly construed. Thus, that motion presented a constitutional claim that was cognizable on federal collateral attack.

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[2] Although the petitioner has not raised this point, the statute entitled him to a certificate of appealability by virtue of Judge McMillian's dissenting vote. Section 2253(c)(1) states that the appeal may proceed if *"a* circuit justice or judge" issues a certificate of appealability, not the court itself or a three-judge panel; *compare* 28 U.S.C. § 2244(b)(3)(B) (under same Act, authorization for permission to file second or successive petition must be granted by "a three-judge panel of the court of appeals"). Congress's choice of different language for different provisions of the AEDPA is determinative of its intent to create a different meaning. *Lindh v. Murphy*, 138 L. Ed. 2d 481 (1997). While a Circuit may chose to assign such motions to three-judge panels, *see In re Burwell*, 350 U.S. 521, 522 (1956), the court cannot thereby repeal the petitioner's right to appeal with the permission of a single judge. *See* 4th Cir. R. 22(a); proposed 3d Cir. R. 22.3 (adopting this reading).

Jackson v. Virginia, 443 U.S. 307 (1979); *cf. Davis v. United States*, 417 U.S. 333 (1974). His showing in support of that claim was, to say the least, "substantial." The decision below refusing him any right to appeal from the erroneous denial of his § 2255 motion is based on a simple but grievous mistake in identifying the constitutional right at issue. This Court should grant certiorari and reverse.

The Eighth Circuit's refusal to hear petitioner Hohn's appeal stacks injustice upon injustice. The district court decision that is insulated from appellate review is premised upon an absolute "waiver" rule that the Eighth Circuit would now renounce. The district court in this case denied § 2255 relief on the basis that petitioner Hohn "waived" his *Bailey*-based claim by not raising it on direct appeal. The district court did not consider that "waiver" to be a procedural default that could be excused on the basis of "cause and prejudice," as it should have under this Court's cases. *United States v. Frady*, 456 U.S. 152 (1982); *Davis v. United States*, 411 U.S. 233 (1973). The Solicitor General has confessed that this approach, taken in this and other Eighth Circuit cases, is indefensible. *See* Brief for the United States, *Bousley v. Brooks*, No. 96-8516 (filed June 6, 1996). Above all, the district court's decision is groundless because it explicitly rests upon overturned law. After vacatur and remand by this Court, the Eighth Circuit reversed its decision that announced the absolute "waiver" rule. *United States v. McKinney*, 79 F.3d 105 (8th Cir. 1996), *vacated*, No. 96-6348, 1997 U.S. LEXIS 3099 (U.S. May 19, 1997), *on remand*, No. 95-2132, 1997 U.S. App. LEXIS 17912 (8th Cir. July 16, 1997).

ARGUMENT

1. Conviction without proof beyond a reasonable doubt of each element of the offense of conviction, properly construed, is a due process violation, cognizable on federal collateral attack and appealable under 28 U.S.C. § 2253(c).

Petitioner Hohn was convicted after trial of violating 18 U.S.C. § 924(c) without any evidence, much less proof beyond a reasonable doubt, that he "used or carried" a firearm "during and in relation to" a drug trafficking offense. *See Bailey v. United States*, 116 S. Ct. 501 (1995) (authoritatively construing § 924(c) as not penalizing conduct forming the basis of petitioner Hohn's conviction). Were it to reach the issue, the Eighth Circuit itself would certainly conclude that petitioner Hohn was wrongfully convicted. *United States v. McKinney*, No. 95-2132, 1997 U.S. App. LEXIS 17912, at *5 (8th Cir. 1997) (stating that having gun available for immediate use does not constitute using or carrying).

Yet after petitioner's motion under 28 U.S.C. § 2255 to vacate that conviction was denied, the Eighth Circuit refused a certificate of appealability, reasoning that:

> [T]he petitioner is not making a constitutional claim: He is making a claim to federal statutory right. *Bailey* did no more than interpret a statute, and an incorrect application of a statute by a district court, or any other court, does not violate the Constitution. The Constitution does not guarantee that judges will always be right. It does guarantee, it is true, that persons accused of crimes will receive due process; but the petition makes no due process claim with respect to the trial judge's actions, and trial errors hardly

ever rise to the level of a due process violation in any case.

Hohn v. United States, 99 F.3d 892, 893 (8th Cir. 1996) (per curiam). The Eighth Circuit thus misconstrued petitioner Hohn's constitutional claim.

Petitioner was not trying to manufacture a constitutional claim out of a statutory violation by asserting that judicial error is a *per se* violation of due process. His claim is that misconstruction of the statute at his trial led to his conviction without proof of guilt, which is a genuine due process violation. All sufficiency-of-the-evidence analysis necessarily rests upon prior statutory construction of the elements of the offense, but the ultimate question of sufficiency is no less a constitutional question on that account. *See, e.g., United States v. Kozminski*, 487 U.S. 931, 953 (1988) (considering whether record contains sufficient evidence of offense, as newly construed in that case, as basis for deciding whether to remand for new trial or for judgment of acquittal); *cf. Hudson v. Louisiana*, 450 U.S. 40 (1981); *Burks v. United States*, 437 U.S. 1 (1978).

Conviction without proof of every element of the offense, properly construed, violates the Fifth Amendment Due Process rights of federal defendants, just as it violates the Fourteenth Amendment Due Process rights of state defendants. *In re Winship*, 397 U.S. 358 (1970). As required by the Constitution, the burden of proving beyond a reasonable doubt every element of the charged offense, as defined by state or federal law, rests upon the prosecution. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Violations of this fundamental principle, if not corrected on direct appeal, are cognizable in petitions for federal

habeas corpus, whether by state or federal prisoners, because they work a denial of a constitutional right – the right to due process of law. *Jackson v. Virginia*, 443 U.S. 307 (1979).

The court below entirely overlooked this basic and simple point (perhaps because it elected to interpret a new statute without the benefit of adversarial briefing). Instead, it ruled that a prisoner advancing such a claim is complaining only of "an incorrect application of a statute. . . . " *Hohn v. United States*, 99 F.3d 892, 893 (8th Cir. 1996). Another Circuit has expressed possible agreement with the decision below, indicating that the Eighth Circuit's decision is not the kind of merely-erroneous precedent that inevitably crops up and must sometimes be ignored; rather, it threatens to become influential. *See United States v. Eyer*, 113 F.3d 470, 474 (3d Cir. 1997) (dictum).[3] This Court should grant the petition to clarify that a conviction on evidence insufficient to prove each element is unconstitutional, even though a court must first construe the statute so as to know what the elements are and how they can be proven. *Kozminski*, 487 U.S. at 953.

Even if it could be said that the petitioner is incarcerated in violation of the statute rather than the Constitution, this statutory violation creates a "complete miscarriage of justice" and is therefore "subject to collateral attack." *Davis v. United States*, 417 U.S. 333 (1974). Moreover, the contention that the prisoner's conviction

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[3] In *Eyer*, the government declined to urge the court of appeals to follow *Hohn*; the court therefore pretermitted the issue. *Eyer*, 113 F.3d at 474.

violates the statute hardly proves that his confinement is not unconstitutional as well – a point this Court did not have to reach in *Davis*. *See United States v. McPhail*, 112 F.3d 197 (5th Cir. 1997) (recognizing, on appeal from denial of § 2255 motion, that *Bailey* announced a non-constitutional rule, to wit, a statutory construction, but that as a result appellant's conviction was supported by insufficient evidence, requiring vacatur of conviction on that count).

For this reason, petitioner's application for a certificate of appealability should have been granted, regardless of how one construes the term "substantial showing of the denial of a constitutional right," as used in 28 U.S.C. § 2253.

2. A certificate of appealability must be granted if the appellant has made a "substantial showing of the denial of a constitutional right" with reference to an issue raised in the § 2255 motion or concerning the disposition of that motion.

In one way, the court below was correct: In asking whether petitioner had made a "substantial showing of the denial of a constitutional right," the court looked past the issue that petitioner would presumably have to raise on appeal to the issue actually presented in petitioner's § 2255 motion. The district court had not reached the merits of petitioner's § 2255 motion but had denied it on the basis that petitioner "waived" his *Bailey* claim by not raising it on direct appeal. Thus, the appeal that petitioner Hohn was seeking leave to pursue would no doubt have turned on whether an absolute "waiver" rule

applies in this situation, or whether, on the other hand, the failure to raise the issue on appeal presents a presumptive procedural default that must be overcome with a showing of "cause and prejudice."[4]

The denial of petitioner's § 2255 motion based upon this erroneous "waiver" rule itself enables petitioner to make a "substantial showing" of denial of his rights, but not of his constitutional rights. Thus, unless Congress carelessly employed the phrase "constitutional right" in § 2253(c) but really meant "federal right,"[5] discernment of the proceeding in which the statute requires the "substantial showing" determines appealability in petitioner's case. Although his constitutional rights were violated in the trial court by his improper conviction, the rights denied in the § 2255 case, at the district court level, were his statutory, procedural rights.

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[4] Not only has the Solicitor General conceded error on this issue, but the Eighth Circuit decision announcing the absolute "waiver" rule was vacated by this Court and reversed by the Eighth Circuit on remand. *See United States v. McKinney*, 79 F.3d 105 (8th Cir. 1996), *vacated*, No. 96-6348, 1997 U.S. LEXIS 3099 (U.S. May 19, 1997), *on remand*, No. 95-2132, 1997 U.S. App. LEXIS 17912 (8th Cir. July 16, 1997); Brief for the United States, *Bousley v. Brooks*, No. 96-8516 (filed June 6, 1996) (confessing error and recommending GVR).

[5] FAMM concurs with the petitioner and with *amicus* NACDL that the statute should be so construed. *See Hunter v. Bailey*, 101 F.3d 1565, 1571 (11th Cir. 1996); *Santana v. United States*, 98 F.3d 752, 757 (3d Cir. 1996).

Section 2253(c)(2), like so many other sections of the AEDPA, is not clear[6]: It does not state whether the required "substantial showing" was meant to refer to the issue(s) to be raised on appeal, or to the issue(s) on the underlying merits, or to either of them, or to both. Clearly, an appeal is equally worthy of going forward in any of these cases. This Court should resolve that question as well in its disposition of petitioner's case and note that a would-be appellant in a habeas or § 2255 matter "has made a substantial showing of the denial of a constitutional right" by demonstrating that such a violation occurred within the underlying criminal proceeding or within the disposition of the § 2255 motion (or § 2254 petition) itself.

In failing to make this point clear, the statute, as drafted, seems to incorporate the assumption that every appeal from the denial of a § 2255 motion will pursue the merits of the underlying claim. Since that often is not and cannot be the case, the Court should clarify that § 2253(c)(2) does not require that each issue raised on appeal present a question of constitutional law. *See United States v. Lozada*, 107 F.3d 1011, 1013 (2d Cir. 1997) (seemingly assuming that issue with respect to which showing must be made is issue to be raised on appeal); *United States v. Orozco*, 103 F.3d 389, 393 (5th Cir. 1997) (same).

To hold otherwise would bar prisoner appeals of such issues as whether the petition was sufficiently specific to withstand summary dismissal, or whether a certain

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[6] *See Lindh v. Murphy*, 138 L. Ed. 2d (1997) (discussing silk purses and pigs' ears).

kind of non-constitutional claim is cognizable in a § 2255 proceeding, or a denial of the right to counsel guaranteed by Fed. R. Gov. § 2255 Proc. 8(c), or the standard of harmless error, or whether there was a procedural default (or a basis for relief from any default, as in this case), or any of a host of other important issues. The statute does not compel such a result, and it should not lightly be assumed that Congress intended to insulate district court decisions from review, or to freeze the development of the law, to this radical extent.

In this case, petitioner has a "substantial" issue to raise on appeal concerning the denial of his § 2255 motion, which he was entitled to have a certificate to pursue, on either of two grounds. First, if "constitutional" means "federal" in § 2253(c)(2), he could appeal because he made a substantial showing that his federal (albeit non-constitutional) right to fair consideration of his § 2255 motion was wrongly denied through misapplication of the procedural default rule. Second, looking past the issue to be raised on appeal to the ultimate question about petitioner Hohn's conviction, he met every definition of a "substantial showing of the denial of a constitutional right," as discussed under Point 1 of this brief.

Nor does the district court's procedural rationale for dismissing the § 2255 motion present an alternate ground of affirmance. To the contrary, that disposition was as flagrantly wrong as that of the court of appeals, as both the Eighth Circuit and the Government would now concede. *See United States v. McKinney*, 79 F.3d 105 (8th Cir. 1996), *vacated*, No. 96-6348, 1997 U.S. LEXIS 3099 (U.S. May 19, 1997), *on remand*, No. 95-2132, 1997 U.S. App. LEXIS 17912 (8th Cir. July 16, 1997); Brief for the United

States, *Bousley v. Brooks*, No. 96-8516 (filed June 6, 1996), *supra*. As this Court has recognized, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Murray v. Carrier*, 477 U.S. 478, 495 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)).

Indeed, the Solicitor General's confession in *Bousley* overlooks one of the two forms of "cause" for relief from the procedural default that exist in post-*Bailey* cases. Not only does petitioner have a good claim of innocence, giving rise to a "fundamental miscarriage of justice," *Schlup v. Delo*, 115 S. Ct. 851, 861 (1995); *Murray v. Carrier*, 477 U.S. at 496,[7] he also has cause for relief from default by virtue of the novelty of the *Bailey* ruling and its essential "unavailability" to attorneys in the Eighth Circuit in the face of controlling, adverse precedent. *Smith v. Murray*, 477 U.S. 527, 536-37 (1986) (discussing *Reed v. Ross*, 468 U.S. 1, 13-16 (1984)).

For all these reasons, as well as those discussed in the petition itself and by *amicus* NACDL, the petition for writ of certiorari should be granted.

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[7] *See also United States v. McKinney*, No. 95-2132, 1997 U.S. App. LEXIS 17912, at *8 (8th Cir. 1997) (holding that conviction of person who is not guilty of violating 18 U.S.C. § 924(c), as construed in *Bailey*, results in "miscarriage of justice").

CONCLUSION

For the foregoing reasons, to rectify a plain miscarriage of justice, this Court should grant the writ of certiorari, vacate the decision below, and summarily reverse the judgment with a *per curiam* opinion pointing out and correcting the grievous legal fallacies on which that decision is based.

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In The

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ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Docket Sheet for the United States Court of Appeals for the Eighth Circuit 3

Portion of Trial Transcript noting objection to the jury instruction on the 18 U.S.C. § 924(c) count (1/9/92) [Tr. 1332-1334] 7

Portion of Trial Transcript containing the jury instruction on the 18 U.S.C. § 924(c) count (1/9/92) [Tr. 1377] 10

Opinion of the United States Court of Appeals for the Eighth Circuit affirming the conviction on direct review (11/8/93) 12

Order by Magistrate Judge Requiring Government to Respond to § 2255 Motion (5/1/96) 27

Government's Response to § 2255 Motion (6/28/96) 31

Order Denying § 2255 Motion (7/18/96) 37

Notice of Appeal (treated as Application for Certificate of Appealability) (7/29/96) 40

Panel Opinion of the United States Court of Appeals for the Eighth Circuit Denying the Certificate of Appealability (11/4/96) 41

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc (2/10/97) 49

Supreme Court Order Granting Petition For Certiorari and Motion For Leave To Proceed In Forma Pauperis (10/31/97) 50

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
July 8, 1992	Judgment and Conviction
November 8, 1993	Judgment and Conviction affirmed on direct appeal
January 24, 1996	Motion for Collateral Relief under 28 U.S.C. § 2255 filed
May 1, 1996	Order by Magistrate Judge Requiring Government to Respond to § 2255 Motion
July 18, 1996	Order of the United States District Court for the District of Nebraska dismissing motion for collateral relief
July 29, 1996	Notice of appeal filed in district court
August 13, 1996	Case docketed by the United States Court of Appeals for the Eighth Circuit
August 13, 1996	Notice of Appeal treated as an Application to the United States Court of Appeals for the Eighth Circuit for Certificate of Appealability
September 13, 1996	Case submitted to a panel
November 4, 1996	Opinion of the United States Court of Appeals for the Eighth Circuit denying Certificate of Appealability

February 10, 1997	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

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GENERAL DOCKET FOR
Eighth Circuit Court of Appeals

Court of Appeals Docket #: 96-3118 Filed: 8/13/96
Arnold F. Hohn v. USA
prisoner petition – federal – motion to vacate PRO SE
Appeal from: U.S. DISTRICT COURT, NEBRASKA

Lower court information:
District: 0867-8 :8:CV96-100 lead: 8:CR90-93
Trial Judge: William G. Cambridge, Chief Judge
Date Filed: 1/24/96
Date order/judgment: 7/18/96
Date NOA filed: 7/29/96

Fee status: pending

Prior cases:
92-2653 FJM DPL DRH
Date filed: 7/24/92 Date disposed: 11/8/93 Disposition:

Current cases:
None
Counsel Information

ARNOLD F. HOHN Petitioner - Appellant	Arnold F. Hohn #13249-047 [NTC pro] U.S. PENITENTIARY P.O. Box 1000 Leavenworth, KS 66048

v.

UNITED STATES
OF AMERICA
Respondent - Appellee

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ARNOLD F. HOHN

Petitioner - Appellant

v.

UNITED STATES
OF AMERICA

Respondent - Appellee

8/13/96	Prisoner Case Docketed Dist. Ct. Office: Omaha [744605] (llb)
8/13/96	APPLICATION for Certificate of Appealability [96-3118] [744620], (notice of appeal), docket entries, and judgment of 7/18/96 (llb)
8/13/96	MOTION of aplnt, Arnold F. Hohn, for leave to proceed on appeal in forma pauperis. [96-3118] [744622] (llb)
8/13/96	RECORDS received: Original File, consisting of 1 Volume(s), Location STL. [96-3118] (llb)
8/22/96	APPEARANCE for appellee, attorney Michael P. Norris [96-3118] [748379] (llb)
9/13/96	CASE SUBMITTED to a panel. [96-3118] (paw)
11/4/96	THE COURT: Theodore McMillian, Frank J. Magill, Morris S. Arnold. PER CURIAM

	OPINION FILED: PUBLISHED, DISSENT by Theodore McMillian [96-3118] [775934] (paw)
11/4/96	JUDGMENT: Theodore McMillian, Frank J. Magill, Morris S. Arnold denying application for Certificate of Appealability [744620-1] Application for Certificate of Appealability is denied in accordance with the opinion. [96-3118] [775938] (paw)
12/19/96	PETITION for REHEARING with suggestions for rehearing en banc. Filed by Appellant Arnold F. Hohn, w/service. TO COURT. [96-3118] (paw)
12/30/96	Clerk Letter sent notifying that party has an opportunity to respond to petition for Rehearing with suggestion for rehearing en banc filed by Arnold F. Hohn [793808-1] [96-3118] Response due by 1/9/97 (ema)
1/8/97	MOTION of aplee, USA, for extension of time to file a response to petition for rehearing until 1/21/97. [96-3118] [800150], TO COURT. w/service (paw)
1/10/97	JUDGE ORDER: granting appellee motion extension of time to file response to petition. [800150-1] [96-3118] [800265] Response to petition for rehearing due 1/21/97 (paw)
1/23/97	RESPONSE to petition for Rehearing with suggestion for rehearing en banc filed by Arnold F. Hohn [793808-1] [804073]. Response filed by USA. w/service TO COURT. [96-3118] (paw)
2/10/97	JUDGE ORDER: denying petition for Rehearing with suggestion for rehearing en banc [793808-1] filed by Arnold F. Hohn.

Judges McMillian, Beam, Loken and Hansen would grant. Petition for panel Rehearing is also denied. [96-3118] [810967] (paw)

2/19/97 MANDATE ISSUED [96-3118] (paw)

3/5/97 RECEIPT for Mandate. [96-3118] [820517] (paw)

3/11/97 Record Sent out of the office to lower court at the end of appellate proceedings, Records included: 1 OF; [96-3118] (paw)

5/19/97 U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 5/14/97. Supreme Ct. Case No.: 96-8986 [96-3118] [855896] (paw)

11/10/97 U.S. Supreme Court order granting Supreme Court notice for certiorari limited to the following question: In light of the fact that the Court of Appeals denied the petitioner's request for a certificate of appealability, does this court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Solicitor General? [855896-1] . Order filed in the Supreme Court on 10/31/97 Sup. Ct. No. 96-8986 [96-3118] (paw)

Portion of Trial Transcript noting objection to the jury instruction on the 18 U.S.C. § 924(c) count (1/9/92)

INSTRUCTION CONFERENCE

* * *

[1332] Eighth Circuit instructions to the extent they have and I will withdraw my request for them.

THE COURT: All right. Thank you. Now, Mr. Cohen, do you have any objections to the Court's proposed instructions 1 through 30 –

MR. COHEN: Yes, Your Honor.

THE COURT: – inclusive, as they have now been amended?

MR. COHEN: Yes, Your Honor, I do. I think I have just two. The first concerns Instruction Number 7.

THE COURT: All right.

MR. COHEN: The present language half way down the page that paragraph starts out, "The phrase 'used a firearm' means having a firearm available to aid in the commission of," and it goes on and then later in that same paragraph says, "but does not require proof beyond a reasonable doubt that the firearm was available to provide protection." And I would ask that the Court change the phrase to instead read, "for the purpose of."

THE COURT: I'm sorry, I am –

MR. COHEN: I wasn't very eloquent. I believe the instruction as it is now allows this jury to find that merely having a firearm available is sufficient, and in this case where the defendant collected guns and used them

for other purposes, there is on doubt [sic] that firearms were available [1333] to aid in the commission of a drug offense, but whether those firearms were present for the purpose of aiding in the commission of that offense is a different question, and I think the intent of the statute was to prohibit people from using firearms to further their drug activities. I think this instruction as it is now allows the jury to convict Mr. Hohn even if there was no evidence that he was using these firearms to or that he had them available to him to further his drug activities. So I am suggesting that we should drop the where it says, "to aid in the commission of" and change that to read "for the purpose of aiding in the commission of."

THE COURT: That phrase comes out of the pattern Eighth Circuit, it doesn't come out of the pattern Eighth Circuit instruction itself, the form of it, which is 6.18.924, but it comes out of the language that is contained in the section of that pattern instruction entitled Notes on Use. I refer specifically to page 4 thereof, which is footnote 8, footnote 8 of the instruction, the pattern form instruction, which is in place in the form following the word carry. There it says, "No definition of carry is provided, but where carrying is charged," and it is charged here, "a definition may be appropriate. Carrying does not depend on proof that the defendant had actual possession of the weapon or used it in any affirmative manner," with reference to, cited there, three cases. One of them is the Fifth Circuit case decided [1334] the United States versus Rayborn (phonetic), United States versus Costa Czarez (phoenetic) and United States versus Brookington (phonetic) and then it goes on. It does not, the comment goes on or the note goes on to say that it

does not, it does require evidence that the firearm was available to provide protection to the defendant in connection with his drug trafficking, or to facilitate his success. The original version of this statute, some affirmative use of the weapon would require a nonviolent, nondrug trafficking crime, however, crimes in this category are no longer covered by this statute. The objection is overruled. I am going to add, however to the paragraph the words after the words, I am talking now about the paragraph that starts out the phrase, "used a firearm," means having a firearm available, et cetera, I am going to add on to the end of that paragraph the words "or to facilitate success."

All right, any other objections?

MR. COHEN: Yes, Your Honor. Instruction Number 8. The last sentence on the first page, "You are instructed that malicious destruction of property is a crime punishable by imprisonment for more than one year under the laws of the State of Nebraska." I would object to that. This was a 1974 conviction under the laws of the State of Nebraska. There has been no evidence as to what the maximum penalty for that crime was at that time. In fact, the only evidence the Government

* * *

Portion of Trial Transcript containing the jury instruction on the 18 U.S.C. § 924(c) count (1/9/92)

CLOSING ARGUMENTS

* * *

[1377] crime, a lesser included offense under Count I.

Instruction Number 7. The crime of using and carrying a firearm during and in relation to a drug trafficking crime, as charged against the defendant, Arnold F. Hohn, in Count II of the indictment has two essential elements, which are:

One, the defendant committed the crime of possession of Methamphetamine with intent to distribute; and

Two, during and in relation to the commission ot that crime the defendant knowingly used or carried a firearm.

The phrase "used a firearm" means having a firearm available to aid in the commission of possession of Methamphetamine with intent to distribute. Similarly, the phrase "carried a firearm" does not require proof of actual possession of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was available to provide protection in connection with the possession of Methamphetamine with intent to distribute or to facilitate success.

For you to find the defendant Arnold F. Hohn, guilty of the crime charged under Count II of the indictment, the Government must prove both of these essential elements beyond a reasonable doubt; otherwise you must

find the defendant, Arnold F. Hohn, not guilty of the crime charged under Count II of the indictment.

* * *

UNITED STATES of America, Appellee,

v.

Arnold F. HOHN, Appellant.

No. 92-2653.

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 16, 1993.

Decided Nov. 8, 1993.

James M. Davis, Omaha, NE, argued, for appellant.

Michael P. Norris, Omaha, NE, argued, for appellee.

Before MAGILL, Circuit Judge, LAY, Senior Circuit Judge, and HANSEN, Circuit Judge.

MAGILL, Circuit Judge.

Arnold F. Hohn (Hohn) appeals from the final judgment entered in the district court[1] upon a jury verdict of guilt [sic] on all offenses. Hohn's appeal challenges three rulings of the district court. Hohn contends that the district court erred by denying his motion to dismiss on Speedy Trial Act grounds, by denying his motion to suppress evidence, and, finally, by denying his motion to dismiss Count I of the indictment which charged him with the distribution of drugs within 1000 feet of a public school. For the reasons discussed below, we affirm.

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[1] The Honorable William G. Cambridge, United States District Judge for the District of Nebraska.

I. BACKGROUND

The Omaha, Nebraska, police received information from a confidential informant implicating Hohn as a methamphetamine dealer distributing from his home. The informant told the police, among other details, that Hohn was "paranoid," had a vicious dog, and always had at least one gun on his person. The police investigated the information received from the informant and, in the course of the police investigation, Hohn's curbside garbage receptacle was inventoried. The garbage inventory and subsequent testing revealed, among other drug-related items, a zip-lock bag and sno-seals[2] that both tested positive for methamphetamine. The police obtained a "no-knock" search warrant pursuant to Nebraska state law. Hohn was arrested when the search of his residence on June 20, 1990, resulted in the recovery of approximately sixteen grams of methamphetamine, drug paraphernalia, multiple weapons, and money.

Hohn's residence was located within 177 feet of the Central Park Elementary School (Central Park). Central Park's last day of classes for the 1989-90 school year was June 7, 1990. Because the Omaha public school system planned to remodel and attach an addition to the present building, the student body was temporarily reassigned to another building for the 1990-91 school year. From the last day of classes through the date of Hohn's trial, Central Park was carried on the school system's books as a public school. On June 20, 1990, the date of Hohn's arrest,

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[2] Sno-seals are folded paper used to hold powdered substances such as cocaine and methamphetamine.

the public maintained access to the school grounds for recreational purposes.

Hohn was consequently indicted on August 24, 1990, on three counts: (I) possession with intent to distribute methamphetamine within 1000 feet of real property comprising a public school in violation of 21 U.S.C. § 845a; (II) use of a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1); and (III) being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g) and 924(a)(2). Hohn made an initial appearance at his arraignment on August 30, 1990.

To gain additional time for pretrial motions, the government and Hohn entered into a stipulated agreement to extend the time for pretrial motions until October 19, 1990. The court then entered an order stating that the time between September 19 and October 19 was excludable for Speedy Trial Act purposes.

On October 1, 1990, a pretrial services officer filed a petition for action on conditions of pretrial release (the petition), thus notifying the court that Hohn's urine specimens had tested positive for amphetamine and methamphetamine. The court consequently held a hearing regarding that petition on October 11, 12, and November 9, 1990. The defendant and the government both presented evidence and argument at this hearing. The court found on November 9 that the government had presented clear and convincing evidence that Hohn had violated his conditions of release and ordered Hohn detained.

Hohn's counsel filed a motion to withdraw on December 10, 1990, and the court allowed Hohn's counsel to withdraw on December 18, 1990. On that same date,

Hohn's new counsel filed a motion to reconsider detention and urged the court to place Hohn in drug treatment as opposed to continuing to detain him. The court requested pretrial services to investigate Hohn's eligibility for drug treatment and, on December 20, pursuant to pretrial services' advice, released Hohn and ordered him to complete inpatient drug treatment or return to custody. The December 20, 1990, order specifically stated that if Hohn successfully completed drug treatment, a subsequent hearing would be held regarding further terms and conditions of release. Hohn entered inpatient treatment at St. Gabriel's Alcohol and Drug Treatment Center on December 20, 1990.

Hohn filed a motion to dismiss on Speedy Trial Act grounds on January 14, 1991. Meanwhile, on January 23, 1991, Hohn completed drug treatment and was released pursuant to a court order specifying his terms and conditions of release.

II. DISCUSSION

A. The Speedy Trial Act Claim

The Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1988), requires that a criminal defendant be tried within seventy days of the indictment or the date of first appearance before a judicial officer, whichever is later. *Id.* § 3161(c)(1). The statute allows, however, certain delays to be excluded for purposes of calculating the seventy-day time limit. *See id.* § 3161(h). If the government fails to comply with the terms of the Speedy Trial Act, a defendant may move for dismissal either with or without prejudice. *Id.* § 3162(a). The district court's legal findings are reviewed

de novo, but factual findings are reviewed under the clearly erroneous standard. *United States v. Hoslett*, 998 F.2d 648, 652 (9th Cir.1993).

Hohn argues that the court incorrectly excluded two periods of delay from its calculation for Speedy Trial Act purposes: (1) the period from October 20 through November 9 (twenty-one days), during which the court considered pretrial services' petition[3]; and (2) the period from December 21 through January 13, 1991 (twenty-four days), during which Hohn was treated as an inpatient at St. Gabriel's Alcohol and Drug Treatment Center.[4] The district court[5] excluded both these periods of time from its calculation of the seventy-day limit because it found that the first period was excludable pursuant to § 3161(h)(1)(F) as a pretrial motion and the second period of time was excludable pursuant to either § 3161(h)(1)(F)

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[3] Pretrial services' petition was filed on October 1. However, the period of time up to and including October 19 is not in dispute.

[4] The status of the other days is not in dispute. The parties agree that the period from August 31, 1990, through September 18, 1990, counts towards the 70-day limit (a total of 19 days). The parties likewise agree that September 19 through October 19 is excludable pursuant to the stipulated agreement. The parties agree that the period of time from November 10 through December 9 counts towards the 70-day limit (bringing the total to 49 undisputed days). The parties also agree that December 10 through December 20 is excludable due to the motions that were filed before the court.

[5] Magistrate Judge Richard G. Kopf made these findings. The district court, after a de novo review, adopted the magistrate judge's report in its entirety. The magistrate judge's findings subsequently adopted by the district court will be referred to as the district court findings.

or, in the alternative, § 3161(h)(4). We find that for purposes of determining whether the Speedy Trial Act seventy-day limit had lapsed, both periods of time were properly excluded from the district court's calculation of time.

1. October 20, 1990, through November 9, 1990

The period of time from October 20 through November 9 was properly excluded pursuant to § 3161(h)(1)(F) (subsection (F)) as a pretrial motion. The Speedy Trial Act allows for the exclusion of periods of delay due to proceedings concerning the defendant. The Act states in pertinent part:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to –
>
> . . . .
>
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.

18 U.S.C. § 3161(h)(1)(F).

Hohn contends that the period of delay from October 20 through November 9 cannot be excluded pursuant to subsection (F) because subsection (F) refers to pretrial

motions and not petitions. Hohn further contends that because the petition was filed by pretrial services, and not a party, the court may not exclude this period of delay pursuant to subsection (F). Finally, Hohn contends that when the court granted continuances from the hearing's initial date of October 11 to October 12 and then to November 9, the court erred when it failed to make the specific statutory finding required pursuant to § 3161(h)(8)(A).

Section 3161(h)(1) specifically states that the periods of delay are "including but not limited to," thus creating in the statute the presumption that the scope of its enumerated delays are not to be interpreted narrowly. A motion is an application to the court for an order. Fed.R.Crim.P. 47. Once pretrial services had filed its petition, the government, now notified of Hohn's possible violation of his terms of release, was requesting the court to revoke Hohn's release – issue an order – when it presented its argument and evidence before the court on October 11, 12, and November 9.

We find that pretrial services' petition is the functional equivalent of a motion to revoke detention. Pretrial services discovered through urine testing that Hohn tested positive for methamphetamine. The use of methamphetamine was a violation of Hohn's original conditions of release and hence pretrial services was obligated to inform the court of its discovery. After the petition was filed, the government proceeded to prosecute the claim that Hohn had violated the court's original conditions of release. The court noted in its order revoking release that the government had established clear and convincing evidence that the defendant violated a term of release.

Hence, the court treated the petition precisely as it would have treated a motion for revocation of release brought either by the court's own motion or by the government. If the initial filing with the court had been brought by the government as a motion, Hohn's contention that the period from October 20 through November 9 cannot be excluded for Speedy Trial Act purposes would be untenable.

Petitions may be the functional equivalent of other recognized § 3161(h)(1) delays. *See United States v. Davenport*, 935 F.2d 1223, 1233 (11th Cir.1991); *accord United States v. Tyler*, 878 F.2d 753, 757 (3d Cir.), *cert. denied*, 493 U.S. 899, 110 S.Ct. 254, 107 L.Ed.2d 203 (1989). In *Davenport*, the defendant filed a petition for a writ of habeas corpus alleging that his pretrial detention violated the Speedy Trial Act. 935 F.2d at 1231. The *Davenport* court found that an extraordinary writ such as a petition for a writ of habeas corpus was functionally equivalent to an interlocutory appeal which is statutorily excludable under § 3161(h)(1)(E), because both an interlocutory appeal and a petition for a writ serve the same underlying purpose. *Id.* at 1233. Hence, in *Davenport*, time related to the petition for a writ's determination tolled the Speedy Trial Act clock. Similarly, we find that pretrial services' petition for action on conditions of pretrial release is the functional equivalent of a motion to reconsider pretrial release, because both serve the same underlying purpose.

Motions excludable under subsection (F) include any pretrial motion and are not limited to those motions enumerated in Federal Rule Criminal Procedure 12(b)(2). *United States v. Wilson*, 835 F.2d 1440, 1443 (D.C.Cir.1987).

Pretrial motions are excludable under subsection (F) because these motions require both court and party time. *Id.* Delay attributable to motions to revoke pretrial detention, from the date of filing until the matter is taken under advisement by the court,[6] is excluded pursuant to subsection (F). *United States v. Bowers*, 834 F.2d 607, 609 (6th Cir.1987). Thus, because pretrial services' petition is the functional equivalent of a motion to revoke pretrial detention, we find the time from the date the petition was filed until its final disposition at the end of the hearing is excluded for purposes of the Speedy Trial Act.

A nonparty to a criminal action may initiate a delay excludable pursuant to § 3161(h). Excludable delays may be caused by co-defendants. *See id.* § 3161(h)(7). Excludable delays may also be initiated by the court. *See, e.g., id.* § 3161(h)(1)(B), (C), (3)(A), (8)(A). The Pretrial Services Act of 1982[7] established pretrial services in each judicial district in order to assist judicial officers both in making pretrial release decisions and to supervise and monitor the conditions of release. S.Rep. No. 97-77, 97th Cong., 2d Sess. 1 (1981), *reprinted in* 1982 U.S.C.C.A.N. 2377. The actions of pretrial services officers are both a service to the court and an extension of the court. Any action taken by pretrial services is in effect an action by the court and

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[6] Subsection (F) excludes time from a motion's filing until either the motion is disposed of or taken under advisement. If the court requires time to consider the motion after all information is available, this time is limited to 30 days pursuant to § 3161(h)(1)(J). *Henderson v. United States*, 476 U.S. 321, 329, 331, 106 S.Ct. 1871, 1876, 1877, 90 L.Ed.2d 299 (1986).

[7] *See* 18 U.S.C. § 3152 (1988).

thus contemplated by Congress in enacting the Speedy Trial Act.

Hohn's argument that the district court erred when it failed to make a § 3161(h)(8)(A)[8] statutory finding is without merit. Section 3161(8)(A) allows a court to grant continuances should that court find it is in the interests of justice to do so after weighing the best interests of the defendant and the public to a speedy trial. The court under § 3161(8)(A) is required to make explicit findings; the court is not required to make explicit findings for § 3161(h)(1) delays. Section 3161(8)(A) provides an additional basis, in addition to the (h)(1) bases, for the court to grant a delay which will toll the Speedy Trial Act clock. For example, § 3161(8)(A) is frequently used by the court to grant continuances which will toll the Speedy Trial Act clock when, due to complexities in the case, counsel requires additional time to prepare. *See United States v. Driver*, 945 F.2d 1410, 1414 (8th Cir.1991), *cert. denied*, 502 U.S. 1109, 112 S.Ct. 1209, 117 L.Ed.2d 448 (1992); *United States v. Fogarty*, 692 F.2d 542, 546 (8th Cir.1982), *cert. denied*, 460 U.S. 1040, 103 S.Ct. 1434, 75 L.Ed.2d 792 (1983). The district court did not err when it allowed the

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[8] 18 U.S.C. § 3161(h)(8)(A) states in pertinent part: Any period of delay resulting from a continuance granted by any judge . . . if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth . . . its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

hearing to be continued without making findings; here, the time was properly excluded pursuant to subsection (F), not § 3161(8)(A).

2. December 21, 1990, through January 13, 1991

We further find that the period of time from December 21, 1990, through January 13, 1991, was properly excluded for Speedy Trial Act purposes pursuant to subsection (F).[9] Hohn filed a motion to reconsider detention on December 18.[10] The district court requested the advice of pretrial services. After a hearing on December 20, 1990, and upon the advice of pretrial services, the court entered an order conditionally releasing Hohn on December 20 in order that Hohn could be evaluated at St. Gabriel's Alcohol and Drug Treatment Center. If Hohn was not accepted into drug treatment, he was to be returned to the custody of the United States Marshal. If Hohn failed to successfully complete drug treatment, he was to be returned to the custody of the Marshal. Only upon successful completion of the drug treatment program would the district court then consider granting a release order with specific terms and conditions.

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[9] The district court found this period of time was also excludable pursuant to § 3161(h)(4); that is, the district court found that Hohn while in drug treatment was physically unable to stand trial. Because we find this period of time was properly excluded pursuant to subsection (F), we need not reach the issue of Hohn's physical availability for trial while in drug treatment.

[10] Hohn concedes that subsection (F) excludes the period of time from December 18 through December 20 and is therefore only contending that the period from December 21 through January 13 was improperly excluded.

A motion to reconsider pretrial detention is a pretrial motion for which time is excludable pursuant to subsection (F). *United States v. Noone*, 913 F.2d 20, 27 (1st Cir.1990), *cert. denied*, 500 U.S. 906, 111 S.Ct. 1686, 114 L.Ed.2d 81 (1991). Thus, when Hohn filed his motion to reconsider detention on December 18, subsection (F) tolled the Speedy Trial Act clock until all information necessary to that motion's determination was before the court. Subsection (F) excludes the period of time after a motion is submitted but before it is under advisement. *Henderson*, 476 U.S. at 331, 106 S.Ct. at 1877. That is, subsection (F) excludes the period of time after a hearing in which the court record may remain open to receive further information. Here, the district court did not receive all the information necessary to determine the motion to reconsider detention until January 23, 1991, when Hohn completed drug treatment. The district court's order setting conditions of release was not issued until January 23, 1991. Consequently, during the entire time period at issue, from December 21 until January 13, 1991, the Speedy Trial Act clock was tolled pursuant to subsection (F).

We therefore find that both the period of time from October 20 through November 9 and the period of time from December 21 through January 13, 1991, were properly excluded pursuant to subsection (F). Hence, the motion to dismiss was properly denied because only forty-nine nonexcludable days had passed since Hohn's arraignment before a judicial officer.

B. Other Claims

Hohn makes two other claims: (1) that the district court erred when it denied his motion to suppress evidence, and (2) that the district court erred when it denied his motion to dismiss Count I.

Hohn asserts that evidence obtained from the search of his home should not have been admissible at his trial because the search warrant was defective. He claims that the search warrant was issued without probable cause, and he claims that the state-issued no-knock search warrant[11] violated 18 U.S.C. § 3109. Neither contention has merit. The district court properly concluded that the affidavit supporting the search warrant set forth probable cause, because the police officers sufficiently corroborated the information given by the informant. Furthermore, 18 U.S.C. § 3109[12] is inapplicable. *See United States v. Moore*, 956 F.2d 843 (8th Cir.1992). The issue is not whether the warrant complied with § 3109 but whether the state officials complied with Nebraska law and the Fourth Amendment. *See id.* at 848. We find that the district court properly denied the motion to suppress the

[11] In Nebraska no-knock warrants are expressly allowed. Neb.Rev.Stat. § 29-411 (1989).

[12] 18 U.S.C. § 3109 provides: The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

evidence obtained from this warrant because it was supported by probable cause and complied with Nebraska law and the Fourth Amendment.

Hohn also contends that Count I of the indictment should have been dismissed because he did not distribute drugs within 1000 feet of a school. The schoolyard statute[13] enhances the penalty for individuals convicted of distributing drugs within 1000 feet of a school. 21 U.S.C. § 860 (Supp. III 1988). Hohn's residence was located within 177 feet of Central Park. He argues that Central Park was not a public school at the time of the offense because it was not operational. That is, Hohn maintains that because Central Park was closed for remodeling at the time of the arrest that it was not a school as a matter of law.

The schoolyard statute, however, is unambiguous. For conviction, it simply requires that the defendant have an intent to distribute (or manufacture) a controlled substance and at the time be within 1000 feet of a school. *See* 21 U.S.C. § 860. Nothing in the statute requires that school be in session or that children be near or around the school at the time of the offense. *See United States v. Jones*, 779 F.2d 121, 123 (2d Cir.1985), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1236, 89 L.Ed.2d 344 (1986). In *Jones*, the defendant argued that the schoolyard statute did not apply to his distribution of drugs because the offense occurred at night without any potential for affecting children. *Id.* The *Jones* court rejected this argument finding, as we do, that

[13] Hohn was charged in Count I with a violation of 21 U.S.C. § 845a; however, this statute has been transferred to 21 U.S.C. § 860.

the language in the statute is unambiguous and does not require that a school be open at the time of the offense. *Id.*

The magistrate judge found in an opinion adopted by the district court that as a preliminary matter there was sufficient evidence to find that Central Park was a school. The final determination as to whether Central Park met the statutory definition of school was determined by the magistrate judge to be a question of fact appropriate for the jury. *See also United States v. Brookins*, 919 F.2d 281, 284 (5th Cir.1991) (holding that there was sufficient evidence before the jury for it to find by any common definition that the institution in question was a school). We agree. The Omaha public school system continued to carry Central Park on its books as a school. The children continued to use the school grounds. A school need not be in session to trigger the schoolyard statute's penalties. The district court did not err when it denied Hohn's motion to dismiss Count I.

III. CONCLUSION

Accordingly, we find that the district court properly denied Hohn's motion to dismiss on Speedy Trial Act grounds, his motion to suppress evidence, and his motion to dismiss Count I of the indictment. We affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**8:CR90-93**
v.	)	**MEMORANDUM**
ARNOLD F. HOHN,	)	**AND ORDER**
Defendant.	)	**(Filed**
	)	**May 1, 1996)**

Defendant Hohn has filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. (*See* filing 175). Liberally construing the allegations of the motion, *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), I conclude that the government should respond to defendant's claim.

BACKGROUND

Defendant was convicted on one count of possession with intent to distribute methamphetamine near a school, in violation of 21 U.S.C. §§ 841(a), 845(a); one count of carrying a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1); and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g). Defendant was sentenced to serve a term of 90 months in prison. He appealed the sentence and the United States Court of Appeals for the Eighth Circuit affirmed.

Defendant now attacks his firearm conviction under 18 U.S.C. § 924(c)(1) on the ground that the government failed to present evidence sufficient to establish that he

"used" a firearm within the meaning [sic] that statutory section. As support for that claim defendant cites *Bailey v. United States*, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).[1]

DISCUSSION

A section 2255 motion is not a substitute for direct appeal. *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994); *Poor Thunder v. United States*, 810 F.2d 817, 823 (8th Cir. 1987). As such, a claim which could have been presented on direct appeal generally will not be considered in a section 2255 proceeding absent a showing of "cause" for the failure to raise the issue and "actual prejudice" resulting from that failure. *Ramey v. United States*, 8 F.3d 1313, 1314 (8th Cir. 1993); *Reid v. United States*, 976 F.2d

[1] In *Bailey*, the United States Supreme Court held that, to obtain a conviction for use of a firearm under 18 U.S.C. § 924(c)(1), the government must prove "an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey*, 116 S.Ct. at 505. In so ruling, the Supreme Court overruled prior authority holding that a defendant could be convicted under § 924(c)(1) based on evidence that the firearm was physically available to the defendant or that the defendant intended to use it if the need arose. *See e.g., United States v. Jones*, 990 F.2d 1047, 1050 (8th Cir. 1993) (" 'use' may be inferred from the availability and presence of the firearm, and actual possession is not necessary provided the firearm is under the defendant's control"), *cert. denied*, 114 S.Ct. 699 (1994), *denial of habeas corpus aff'd*, 39 F.3d 1184 (8th Cir. 1994).

The *Bailey* decision applies retroactively. *Bell v. United States*, 917 F.Supp. 681, 683-84 (E.D. Mo. 1996); *Sanabria v. United States*, 916 F.Supp. 106, 109-14 (D. P.R. 1996); *United States v. Turner*, 914 F.Supp. 48, 49-50 (W.D. N.Y. 1996); *Abreu v. United States*, 911 F.Supp. 203, 206-07 (E.D. Va. 1996).

446, 447-48 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1351 (1992). To show cause that would excuse such a procedural default, a defendant must show that some objective factor external to the defense prevented him from raising his defaulted claims. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986).

Defendant in this case did not raise his *Bailey* claim on direct appeal. However, the *Bailey* decision was not handed down by the Supreme Court until December 6, 1995, more than two years after defendants' convictions had been affirmed by the Eighth Circuit. Because *Bailey* was not decided at the time of the direct appeal, there is adequate cause for defendant's failure to raise it. *Bell v. United States*, 917 F.Supp. 681, 684 (E.D. Mo. 1996); *Abreu v. United States*, 911 F.Supp. 203, 207 (E.D. Va. 1996). Further, because the facts of defendant's case arguably fall within the purview of *Bailey*, his conviction under 18 U.S.C. § 924(c)(1) may be invalid, and he thus has established sufficient prejudice. *See id.*[2]

[2] The Eighth Circuit has recently held that *Bailey* is inapplicable where a defendant is convicted under section 924(c)(1) for "carrying" a firearm, as opposed to "using" a firearm. *See United States v. White*, ___ F.3d ___ (8th Cir. 1996) (available at 1996 WL 154228). The judgment in this case indicates that defendant was convicted of "carrying" a firearm in violation of section 924(c)(1). (*See* filing 158). However, the jury was instructed on both the "using" and "carrying" prongs of section 924(c)(1) and the verdict form does not clearly state which of those prongs the jury relied on in finding defendant guilty. (*See* filing 114, Instruction No. 7; filing 116). Thus, it is impossible to determine whether defendant was convicted under the "carrying" prong or the "using" prong of section 924(c)(1).

Consideration of the substance of defendant's claim under *Bailey* is beyond the scope of this initial review. I shall therefore require the government to respond to defendant's claim.

IT THEREFORE HEREBY IS ORDERED:

1. Plaintiff is given twenty days from the date of this order to respond to the defendant's motion in accordance with the terms of this memorandum, pursuant to the rules following 28 U.S.C. § 2255.

2. This file hereby is transferred to Omaha for all further proceedings. The clerk shall direct this matter to the attention of the assigned trial judge.

Dated May 1, 1996.

BY THE COURT

/s/ David L. Piester
United States
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	8:CR 90-00093
Plaintiff,	)	ANSWER TO FILING #175
vs.	)	
ARNOLD F. HOHN,	)	(Filed Jun. 28, 1996)
Defendant.	)	

Pursuant to Rule 5, Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code, and this Court's Order of May 1, 1996, the United States answers Filing #175, Defendant's Motion to Vacate, Set Aside or Correct Sentence, as follows:

1. The United States denies that Arnold F. Hohn is entitled to any post-conviction relief. No evidentiary hearing has been accorded regarding the post-conviction motion. An evidentiary hearing will not be needed as this matter can be resolved on the basis of the record and files before the Court. The United States respectfully submits that this is an issue of law that must be developed from the transcript of the record at trial and post-conviction pleadings and briefs.

2. Hohn claims that his Section 924(c) conviction should be vacated because of the United States Supreme Court's recent decision in *Bailey v. United States*, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). The United States denies that the Supreme Court's decision in *Bailey* would grant relief to Hohn. The United States would submit that sufficient

evidence was presented to support the jury's verdict and Hohn's conviction for carrying a firearm.

3. The United States acknowledges that the jury instruction provided does not comport with the status of law since the Supreme Court's decision in *Bailey*.

Under Federal Rule of Criminal Procedure 30, in order to claim error in a jury instruction, an objection is required which specifies the grounds of the objection. In the present case, the charge to the jury with regard to the 924(c) violation is found in instruction #7. Although Hohn objected to instruction #7, his objection did not go to whether one must affirmatively brandish a firearm but, rather, objected to the wording of the particular instruction. Specifically, Hohn asked the Court to drop the words "to aid in the commission of" and substitute the words "for the purpose of aiding in the commission of." (Tr. at 1332-34). Therefore, only if there is plain error, may this the Court vacate the conviction.

In *United States v. Caldwell*, 954 F.2d 496 (8th Cir. 1992), the Eighth Circuit Court of Appeals said

> "the Supreme Court has explained that the plain-error doctrine 'authorizes the Court of Appeals to correct only 'particularly egregious errors' . . . that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Young*, 470 U.S. 1, 15 (1985) (quoting *United States v. Frady*, 456 U.S. 152, 163 (1982) and *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

The plain-error rule is to be " 'used sparingly,' " and only when there has been a fundamental error so basic and prejudicial that justice could not have been done, or

when the error deprives the accused of a fundamental right. *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 63); *United States v. Garcia*, 897 F.2d 1413, 1422 (7th Cir. 1990). *Id.* 500-501.

The government agrees that it would be plain-error had the instructions only given the jury the option of convicting the defendant under the "use" prong of 18 U.S.C. § 924(c), and the evidence only supported that option. However, in this case, as in *Bailey*, the jury was instructed that the defendant could be convicted if he used *or* carried a firearm.

4. The question remains as to the appropriate standard of review. The Third Circuit, in a case involving a *Bailey* question, has observed:

> "we must now determine whether the district court's error in instructing the jury was harmless or requires reversal of Mr. Price's conviction on the Section 924(c)(1) count. The error was one of statutory interpretation, not constitutional in nature. "We upheld that non-constitutional error is harmless when 'it is highly probable that the error did not contribute to the judgment.' " . . . citations omitted. Because we conclude that the error was harmless, we will affirm.

United States v. Price, 1996 W.L. 67398 (3rd Cir. (Pa.)), at p. 4.

If the Court determines that the error was constitutional in nature, the standard of review would be whether the error was harmless, beyond a reasonable doubt. *See United States v. Davis*, 417 U.S. 333, 346 (1974); *Chapman v. California*, 386 U.S. 11 (1967).

5. Evidence was presented to the jury that Hohn carried a firearm. That evidence is recited in the prosecution version and can be found at the transcript of trial. It is true that Hohn did not have a firearm on his person when the Omaha Police Division's Emergency Response Unit entered and secured the residence for the purpose of executing a search warrant. However, a reasonable inference can be drawn from the evidence that Hohn was carrying a firearm prior to the officers' entry based upon the items that were located, i.e., drugs, guns and ammunition, and where they were located.

The search resulted in the recovery of approximately 16 grams of methamphetamine. One of those grams was recovered from Hohn's person. (Tr. at 408, 646; Exhibit 1). Approximately 12 grams of methamphetamine were contained in a brown case on the kitchen counter. The methamphetamine was further contained in four plastic baggies, three of which held 3.5 grams of methamphetamine. This methamphetamine was surrounded by a .380 caliber semi-automatic pistol, a Colt revolver and a Ruger .357 pistol, all within arms reach of the methamphetamine. Each of these weapons was loaded. (Tr. at 159-160, 163-169, 647; Exs. 8, 9, and 10). Two additional firearms, a Ruger .22 caliber semi-automatic pistol and an Excam .22 caliber revolver were also found in the kitchen. (Tr. at 417-420, 648; Exs. 18, 19 and 20).

The .380 caliber semi-automatic pistol and the Colt revolver found on the kitchen counter within arms reach of the methamphetamine, packaged for redistribution, were found in holsters. The obvious inference to be drawn from this evidence is that Hohn, at some time prior to the execution of the search warrant, entered his

residence and placed his belongings, which included the methamphetamine and firearms, onto the counter. Therefore, at some point prior to the execution of the search warrant, he obviously carried the firearms during his drug trafficking activities.

6. The evidence obviously establishes "carrying," under 18 U.S.C. § 924(c). The Supreme Court said in *Bailey*, "a firearm can be carried without being used, e.g., when an offender keeps a gun hidd3en in his clothing throughout a drug transaction." Furthermore, in *United States v. Freisinger*, 937 F.2d 383, 387 (1991), this court held that transporting weapons in the passenger compartment of a car constitutes carrying them within the meaning of the statute.

7. The United States respectfully submits that the instruction to the jury was error, but harmless. The United States respectfully submits that the Motion to Vacate, Set Aside or Correct Sentence should be denied. The United States would inform the Court that a similar issue is presently before the Eighth Circuit Court of Appeals. On April 8, 1996, the Court heard argument in *United States v. Behler*, Case No. 92-3956NEL. As of this date, a decision has not been rendered.

Respectfully submitted,

THOMAS J. MONAGHAN
United States Attorney

/s/ Michael P Norris
By: MICHAEL P. NORRIS
(#17765)
Assistant United States
Attorney
P.O. Box 1228-DTS
Omaha, Nebraska 68101-1228

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing was served on the following by placing same in the U.S. Mails, postage prepaid, this 28th day of June, 1996.

Arnold F. Hohn, #13249-047
P.O. Box 1000
Leavenworth, Kansas 66048

/s/ Michael P Norris
Assistant U.S.
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, v. ARNOLD F. HOHN, Defendant.	)	8:CR90-93 **MEMORANDUM OPINION** (Filed Jul. 18, 1996)

This matter is before the Court on the defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (filing 175). Because the Court finds that the defendant is not entitled to the relief he seeks, the Court will dismiss the defendant's motion.

In his motion, the defendant attacks his conviction for using a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). The defendant argues that, in light of the United States Supreme Court's opinion in *Bailey v. United States*, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), the government did not present enough evidence at his trial to sustain a conviction under § 924(c)(1). However, as Magistrate Judge Piester noted upon initial review of the defendant's motion, the defendant did not raise his *Bailey* claim on direct appeal. *See* filing 176, p. 3. Thus, the Court finds that the defendant has waived that claim, *See United States v. McKinney*, 79 F.3d 105, 109 (8th Cir. 1996) (concluding that Mr. McKinney had waived his argument based on *Bailey* because "Mr. McKinney's motion for acquittal did not challenge the correctness of [the Eighth Circuit's] previous cases, he did not object to

the instruction that embodied the principles announced in those cases, and he did not argue in his initial appeal brief that his conviction for using firearms was in any way infirm"), and that the defendant's motion, which is based on that claim, should be dismissed with prejudice. Accordingly, the Court will enter separate judgment dismissing the defendant's motion with prejudice.

Dated this 18th day of July, 1996.

BY THE COURT:

/s/ William G Cambridge
WILLIAM G. CAMBRIDGE,
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	8:CR90-93
	)	
v.	)	JUDGMENT
	)	
ARNOLD F. HOHN,	)	(Filed
	)	
Defendant.	)	Jul. 18, 1996)

In accordance with the memorandum opinion entered herein on this date, it is ordered that the defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (filing 175) is dismissed with prejudice.

DATED this 18th day of July, 1996.

BY THE COURT:

/s/ William G Cambridge
WILLIAM G. CAMBRIDGE,
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF NEBRASKA

ARNOLD F. HOHN DEFENDANT,	)	
VS.	)	CASE NO.
UNITED STATES OF AMERICA PLAINTIFF,	)	8:CR90-93

NOTICE OF APPEAL

(Filed Jul. 29, 1996)

NOTICE IS HEREBY GIVEN THAT ARNOLD F. HOHN, DEFENDANT IN THE ABOVE CAPTIONED CAUSE, HEREBY APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT FROM THE ORDER DENYING MOTION 28 U.S.C. SECTION 2255, ENTERED IN THIS ACTION ON THE 18TH DAY OF JULY, 1996; RECEIVED BY DEFENDANT ON THIS THE 21ST DAY OF JULY, 1996; BY WAY OF UNITED STATES MAIL. DEFENDANT WILL SHOW THIS RULING IS NOT CONSISTENT WITH CLEARLY ESTABLISHED LAW, AND IS THEREBY IN ERROR AND IS SUBJECT TO REVIEW BY THE APPELLANT COURT. ARNOLD F. HOHN HEREBY APPEALS THE DISTRICT COURT'S JUDGEMENT.

Dated this 24 day of July, 1996.

/s/ Arnold Hohn
ARNOLD F. HOHN
REG. NO. 13249-047
B-2 DORM L.V.C.
P.O. BOX 1000
LEAVENWORTH, KANSAS
66048-1000

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3118

Arnold F. Hohn, *
Appellant, * Appeal from the United
* States District Court for
v. * the District of Nebraska.
*
United States of America, * (PUBLISHED)
*
Appellee. *

Submitted: September 13, 1996

Filed: November 4, 1996

Before McMILLIAN, MAGILL, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

The petitioner in this case, unsuccessful in his effort to have his sentence set aside under 28 U.S.C. § 2255, seeks review in this court. Petitioner's appeal, however, will not lie unless we issue him a certificate of appealability, and such a certificate is not available unless the petitioner makes a "substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2).

The petitioner complained to the district court that at his trial the jury instructions dealing with what it means

to use a firearm under 18 U.S.C. § 924(c)(1) did not conform to the principles outlined in *Bailey v. United States*, 116 S.Ct. 501 (1995). It seems to us that under these circumstances a certificate cannot issue, because the petitioner is not making a constitutional claim: He is making a claim to a federal statutory right. *Bailey* did no more than interpret a statute, and an incorrect application of a statute by a district court, or any other court, does not violate the Constitution. The Constitution does not guarantee that judges will always be right. It does guarantee, it is true, that persons accused of crimes will receive due process; but the petitioner makes no due process claim with respect to the trial judge's actions, and trial errors hardly ever rise to the level of a due process violation in any case.

United States v. Liquori, 438 F.2d 663 (2d Cir. 1971), on which Judge McMillian relies in his dissenting opinion, is not to the contrary. The predicate for that case was that the Supreme Court had on constitutional grounds invalidated certain statutory presumptions, *see id.* at 666-67, and the petitioners were claiming that the statute under which they were convicted was invalid because it contained an unconstitutional presumption. *See id.* at 665. There is no such claim here. The petitioner does not maintain that § 924(c)(1) is unconstitutional or that it was unconstitutionally applied to him. He maintains only that the statute was wrongly applied to him.

For the foregoing reasons, we deny the certificate.

McMILLIAN, Circuit Judge, dissenting.

Arnold F. Hohn appeals from the district court's dismissal with prejudice of his 28 U.S.C. § 2255 motion

claiming the benefit of *Bailey v. United States*, 116 S.Ct. 501 (1995). Section 102 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, amended 28 U.S.C. § 2253(c) to require a "substantial showing of the denial of a constitutional right" before a certificate of appealability may issue. The court denies Hohn a certificate. I must respectfully dissent.

Background

After a confidential informer told police Hohn was a high-level methamphetamine dealer, they investigated and obtained a no-knock warrant. When the police arrested Hohn in his living room, they found one gram of methamphetamine in his wallet. They also went to the kitchen where they found 15.8 grams of methamphetamine, three loaded pistols approximately one foot from the drug, and another firearm. In Hohn's bedroom the police found 3.1 grams of methamphetamine in a cigarette package and another loaded pistol approximately two feet from the package. Finally, in another bedroom they found drug paraphernalia and a gun case with shotguns and rifles. Cindy Vandry arrived at the house during execution of the warrant. She had twice purchased methamphetamine from Hohn at his home, and on those occasions she had observed "a substantial amount of currency in the bedroom."

The government charged Hohn with possession of methamphetamine with intent to distribute it, using and carrying fifteen firearms in relation to the methamphetamine offense, and being a felon in possession of firearms. He stood trial, admitted possession of some of

the methamphetamine, admitted he owned the firearms as an avid gunsmith and hunter, disputed the police version of the location of some of the firearms, and testified he believed he could legally possess the firearms because his attorney had told him that his 1974 juvenile conviction for malicious destruction of property did not count as an adult felony.

At trial, counsel urged substitution of "for the purpose of" in place of "available to aid in the commission of" in the verdict director for the firearms "use" charge. The jury convicted Hohn on all counts. He did not raise the instructional issue in his pre-*Bailey* appeal. This court affirmed. *United States v. Hohn*, 8 F.3d 1301 (8th Cir. 1993).

In his § 2255 motion, Hohn argued: (1) his conduct was not a violation of 18 U.S.C. § 924(c)(1) as interpreted by *Bailey;* a fundamental miscarriage of justice would result unless the court addressed the issue; (3) he should not be penalized for not raising the issue on direct appeal because he relied on years of Eighth Circuit precedent; (4) denial of a remedy would show "a lack of due process in the judicial system," quoting *United States v. Loschiavo*, 531 F.2d 659, 666 (2d Cir. 1976) (affirming vacation of conviction on change-in-law ground not raised on direct appeal); and (5) he was prejudiced by the jury instruction that said no affirmative firearms use was required but that availability of a firearm was adequate for a guilty verdict.

The government responded that *Bailey* did not aid Hohn because evidence supported a carrying conviction. It admitted the verdict directing instruction was erroneous under *Bailey*, and Hohn was not carrying a firearm

when officers executed the warrant. It argued, however, that the kitchen firearms, "within arm's reach of the methamphetamine," were in holsters and supported the inference that at some time Hohn "entered his residence and placed his belongings, which included the methamphetamine and firearms onto the counter." The government concluded it was obvious Hohn had carried the firearms during his drug trafficking activities, and the instructional error was harmless.

In reply, Hohn argued that the instruction was error under *Bailey*, citing *United States v. Webster*, 84 F.3d 1056, 1060, 1065-66 (8th Cir. 1996) (permitting brief on *Bailey* after initial submission of direct appeal and reversing because plain error in pre-*Bailey* jury instruction permitted conviction for "mere presence and ready availability" of firearm where defendant admitted purchase of a firearm for his protection). He also urged that the government's methamphetamine-within-arm's-reach-of-firearms argument was insufficient under *United States v. White*, 81 F.3d 80, 83 (8th Cir. 1996) (affirming "carrying" conviction on direct appeal and saying government must prove that the defendant bore the firearm on or about his person during and in relation to a drug trafficking offenses), quoting *Bailey*'s language, "the inert presence of a firearm, without more, is not enough to trigger § 924(c)(1)." 116 S.Ct. at 508 (discussing different meanings of "use" – active employment, storage, placement for active use). He included a copy of Cynthia Vandry's testimony that she saw the rifles in the gun case but no handguns when she was at Hohn's house.

The district court noted Hohn had not raised the *Bailey* claim on direct appeal, found he had waived it, and

dismissed the § 2255 motion with prejudice, quoting *United States v. McKinney*, 79 F.3d 105 (8th Cir. 1996) (2-1 decision) (holding *Bailey* issue waived on direct appeal because McKinney did not challenge previous cases, object to the instruction, or argue issue in opening brief).

Discussion

I dissent because I believe the Due Process Clause of the Fifth Amendment does not permit federal convictions for conduct that does not violate a federal statute.[1]

Congress must define federal criminal offenses. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812). Judicial construction of a statute "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (*Rivers*) (footnote omitted). Under these two principles, courts have granted post-conviction relief after changes in the law. *See, e.g., Davis v. United States*, 417 U.S. 333, 346-47 (1974) (§ 2255 proper when law changes so that conviction and punishment are for act the law no longer makes criminal) (change in interpretation of selective service regulation); *United States v. Dashney*, 52 F.3d 298, 299 (10th Cir. 1995) (applying new interpretation of

[1] For that reason, I also disagree with the court's holding that *Bailey* challenges cannot be raised in a § 2255 motion after a plea of guilty. *Bousley v. Brooks*, No. 95-2687, 1996 WL 560214, at *3-4 & nn. 2-4 (8th Cir. Oct. 3, 1996). The better position is, in my opinion, *United States v. Barnhardt*, 93 F.3d 706, 708-09 (10th Cir. 1996) (applying *Bailey* retroactively in second § 2255 motion after defendant pleaded guilty) (collecting *Bailey* cases).

"financial structuring" offense in § 2255 action after defendant had served sentence to prevent complete miscarriage of justice); *Dalton v. United States*, 862 F.2d 1307, 1310 (8th Cir. 1988) (finding new interpretation of mail fraud statute applicable but affirming because no prejudice shown under standard that trial error worked to § 2255 movant's "*actual* and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions," *citing United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original)); *Ingber v. Enzor*, 841 F.2d 450, 454-55 (2d Cir. 1988) (applying new interpretation of mail fraud statute in § 2255 action and excusing failure to raise the claim under earlier interpretation).

The Second Circuit invoked constitutional principles when it confronted four § 2255 challenges to drug convictions in the wake of the Supreme Court's invalidation of statutory presumptions. The court relied on

> the simple and universal rule that a judgment in a criminal case in which the prosecution has offered and the record discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law. . . . We must examine the principles involved in the constitutional ruling under consideration and decide whether, upon "considerations of convenience, of utility, and of the deepest sentiments of justice," the judgments of conviction were so "tainted by some fundamental unfairness within the orbit of constitutional law" that we cannot allow them to stand.

United States v. Liquori, 438 F.2d 663, 669 (2d Cir. 1971) (internal citation omitted).

In post-*Bailey* § 2255 cases, the issue is not advance notice that conduct is criminal (the familiar void-for-vagueness claim), but delayed notice that conduct is not criminal (change-of-law claim under *Rivers* rationale). Because *Bailey* represents such a clear break with precedent regarding the definition of "use" under § 924(c)(1), Hohn had cause for failing to appeal the denial of his objection to the verdict director. *United States v. Wiley*, 922 F. Supp. 1405, 1411 (D. Minn. 1996) (Magnuson, C.J.); *see also Dyer v. United States*, 23 F.3d 1421, 1423-24 (8th Cir.) (rejecting change of law in another circuit as cause), *cert. denied*, 115 S.Ct. 136 (1994); *Dalton v. United States*, 862 F.2d at 1310 (finding cause after new interpretation of mail fraud statute).

Conclusion

I conclude that depriving persons of the benefit of the delayed notice that conduct is innocent violates Due Process by tolerating convictions for conduct that was never criminal. Under that proposition, a post-*Bailey* § 2255 motion presents a constitutional question as required by amended § 2253(c)(2). I also conclude Hohn's case presents a "substantial showing of the denial of a constitutional right." Accordingly, I would grant a certificate of appealability.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3118NEO

Arnold F. Hohn, Appellant,	*	
vs.	*	**Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc**
United States of America, Appellee.	*	

The suggestion for rehearing en banc is denied. Judge McMillian, Judge Beam, Judge Loken, and Judge Hansen would grant the suggestion. The petition for rehearing by the panel is also denied.

February 10, 1997

Order entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

(ORDER LIST: 522 U.S.)

FRIDAY, OCTOBER 31, 1997

CERTIORARI GRANTED

97-174 CASS CTY., MN, ET AL.
V. LEECH LAKE BAND OF INDIANS

97-372 UNITED STATES V. U.S. SHOE CORP.

The petitions for writs of certiorari are granted.

96-8986 HOHN, ARNOLD F. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to the the [sic] following question: In light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Acting Solicitor General? Jeffrey S. Sutton, Esquire, of Columbus, Ohio, a member of the Bar of this Court, is invited to brief and argue this case, as *amicus curiae*, against this Court's jurisdiction.

(8)

Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

No. 96-8986

In the Supreme Court of the United States

OCTOBER TERM, 1997

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Solicitor General?

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

INTRODUCTION AND SUMMARY OF ARGUMENT 8

ARGUMENT 11

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1254(1) TO ISSUE A WRIT OF CERTIORARI 11

A. The Plain Language Of The Statute Confers Jurisdiction Over Any "Case[] In The Court[] Of Appeals" . . . 17

B. The Proceedings On An Application For A Certificate Of Appealability Are No Less A "Case[] In The Court[] Of Appeals" Because The Application Is An Original Proceeding Separate From The Merits 21

TABLE OF CONTENTS — Continued

C. Because Section 1254(1) Authorizes This Court To Review All Cases Over Which The Court Of Appeals Properly Has Jurisdiction, Certiorari Jurisdiction Exists In This Case 23

II. THIS COURT HAS THE POWER TO ISSUE A COMMON-LAW WRIT OF CERTIORARI . 27

III. IT HAS BEEN THIS COURT'S CONSISTENT PRACTICE OVER THE PAST HALF-CENTURY TO ISSUE WRITS OF CERTIORARI TO REVIEW DECISIONS BY THE COURTS OF APPEALS DENYING LEAVE TO APPEAL 32

IV. SECTION 2253 DID NOT ABOLISH CERTIORARI JURISDICTION OVER DENIALS OF CERTIFICATES OF APPEALABILITY 34

V. THIS COURT HAS CERTIORARI JURISDICTION BECAUSE THE AEDPA DOES NOT APPLY RETROACTIVELY TO THIS CASE 40

VI. THIS COURT, OR ANY OF ITS MEMBERS, SHOULD GRANT A CERTIFICATE OF APPEALABILITY 44

CONCLUSION 50

TABLE OF AUTHORITIES

Cases **Page(s)**

Adkins v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948) 16, 33

Allen v. *Hardy*, 478 U.S. 255 (1986) 16, 33

American Construction Co. v. *Jacksonville Railway Co.*, 148 U.S. 372 (1893) 12

Arredondo v. *United States*, 120 F.3d 639 (6th Cir. 1997) 42

Autry v. *Estelle*, 464 U.S. 1301 (1983) 45

Bailey v. *United States*, 116 S. Ct. 501 (1995) 1, 2, 5, 46, 47

Barefoot v. *Estelle*, 463 U.S. 880 (1983) 14, 45

Bilik v. *Strassheim*, 212 U.S. 551 (1908) 37

Blyew v. *United States*, 80 U.S. (13 Wall.) 581 (1871) 18

Bridge v. *Collins*, 494 U.S. 1013 (1990) 32

Burwell v. *Teets*, 350 U.S. 808 (1955). 29, 32

Carden v. *Arkoma Associates*, 494 U.S. 185 (1990) 26

Carafas v. *LaVallee*, 391 U.S. 234 (1968) 33

TABLE OF AUTHORITIES — Continued

Cleveland v. *United States*, No. 96-8837, 1997 WL 195307 (Dec. 12, 1997) 48

Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) . . 35

Connecticut National Bank v. *Germain*, 503 U.S. 249 (1990) 34

Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 34

Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 21

Davis v. *Jacobs*, 454 U.S. 911 (1981) . . . . . *passim*

Demarest v. *Manspeaker*, 498 U.S. 184 (1991) 35

Derrick v. *Collins*, 497 U.S. 1042 (1990) 45

Douglas v. *Green*, 363 U.S. 192 (1960) 33

Ellis v. *United States*, 356 U.S. 674 (1958) 16, 33

Ex parte Kawato, 317 U.S. 69 (1942) 29

Ex parte McCardle, 74 U.S. 506 (1868) 35

Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) 18

Ex parte Patrick, 212 U.S. 555 (1908). 37

Ex parte Peru, 318 U.S. 578 (1943) 27, 29, 31, 34

Ex parte United States, 287 U.S. 241 (1932) 29

TABLE OF AUTHORITIES — Continued

Farley v. *United States*, 354 U.S. 521 (1957) . . . 16, 33

Felker v. *Turpin*, 116 S. Ct. 2333 (1996) . . . . . *passim*

Ferguson v. *District of Columbia*, 270 U.S. 633 (1926) 14

Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368 (1981) 26

Flanagan v. *United States*, 465 U.S. 259 (1984) 26

Forsyth v. *Hammond*, 166 U.S. 506 (1897) . . . . *passim*

Francis v. *Southern Pacific Co.*, 333 U.S. 445 (1948) 38

Fretwell v. *Norris*, 117 S. Ct. 2504 (1997) 33, 41

Gardner v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) 25

Gay v. *Ruff*, 292 U.S. 25 (1934) 18

Graham v. *Collins*, 506 U.S. 461 (1993) 33

Graham v. *Lynaugh*, 492 U.S. 915 (1989) . . . 16, 32-33

Griffin v. *United States*, 502 U.S. 46 (1991) 47, 48

Hardwick v. *Singletary*, 122 F.3d 935 (11th Cir. 1997) 42, 44

Head v. *California*, 374 U.S. 509 (1963) 15

TABLE OF AUTHORITIES — Continued

Holiday v. *Johnston*, 313 U.S. 342 (1941) 28

House v. *Mayo*, 324 U.S. 42 (1945) . . . . . *passim*

Humphrey v. *Cady*, 405 U.S. 504 (1972) 15, 32

Hunter v. *United States*, 101 F.3d 1565 (11th Cir. 1996) 43

In re 620 Church St. Bldg. Corp., 299 U.S. 24 (1936) 28, 31

In re Burwell, 350 U.S. 521 (1956) . . . . . *passim*

In re Hunt, 348 U.S. 968 (1955) 45

In re Quirin, 317 U.S. 1 (1942) 18

In re Shuttlesworth, 369 U.S. 35 (1962) 33

Jeffries v. *Barksdale*, 453 U.S. 914 (1981) 38

Jennings v. *Ragen*, 358 U.S. 276 (1959) 15, 32

Jewell v. *Knight*, 123 U.S. 426 (1887) 15

Johnson v. *Robison*, 415 U.S. 361 (1974) 40

Johnson v. *United States*, 352 U.S. 565 (1957) 33

Johnson v. *United States*, 117 S. Ct. 1544 (1997) . . . 5, 7

Jones v. *Cunningham*, 371 U.S. 236 (1963) 4

TABLE OF AUTHORITIES — Continued

Kerr v. *United States District Court*, 426 U.S. 394 (1976) 23

Koo v. *McBride*, 124 F.3d 869 (7th Cir. 1997) 42

Liberty Mutual Ins. Co. v. *Wetzel*, 424 U.S. 737 (1976) 26

Lindh v. *Murphy*, 117 S. Ct. 2059 (1997) . . . . . *passim*

Lonchar v. *Thomas*, 116 S. Ct. 1293 (1996) 37

Lozada v. *Deeds*, 498 U.S. 430 (1991) 16, 45

Lozada v. *United States*, 107 F.3d 1011 (2d Cir. 1997) 20

Lynce v. *Mathis*, 117 S. Ct. 891 (1997) 16, 32, 33

Mansfield, C. & L. M. Ry. Co. v. *Swan*, 111 U.S. 379 (1884) 26

Maxwell v. *Bishop*, 385 U.S. 650 (1967) 32

McCarthy v. *Harper*, 449 U.S. 1309, 1310 (1981) . . . 32

McClellan v. *Carland*, 217 U.S. 269 (1910) 28, 29

Mistretta v. *United States*, 488 U.S. 361 (1989) 21

Monessen Southwestern Ry. Co. v. *Morgan*, 486 U.S. 330 (1988) 38

Muscarello v. *United States*, No. 96-1654, 1997 WL 195307 (Dec. 12, 1997) 48

TABLE OF AUTHORITIES — Continued

National Farmers Union Ins. Cos. v. *Crow Tribe of Indians*, 468 U.S. 1315 (1984) 17

Nixon v. *Fitzgerald*, 457 U.S. 731 (1982) . . . . . *passim*

NLRB v. *Catholic Bishop*, 440 U.S. 490 (1979) 39

Norton v. *Larney*, 266 U.S. 511 (1925) 27

Nowakowski v. *Maroney*, 386 U.S. 542 (1967) . . 16, 33

O'Rear v. *Attorney General of Wisconsin*, 484 U.S. 1078 (1988) 45

Phelper v. *Decker*, 385 U.S. 18 (1966) 16, 32

Ragan v. *Cox*, 369 U.S. 437 (1962) 33

Richardson-Merrell, Inc. v. *Kohler*, 472 U.S. 424 (1985) 26

Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943) 27, 29

Rogers v. *Teets*, 350 U.S. 809 (1955) 29, 32

Rosoto v. *Warden*, 83 S. Ct. 1788 (1963) 45

Rust v. *Sullivan*, 500 U.S. 173 (1991) 39

Schlagenhauf v. *Holder*, 379 U.S. 104 (1964) . . . 22, 23

Selvage v. *Collins*, 494 U.S. 108 (1990) 16, 32

Smith v. *Digmon*, 434 U.S. 332 (1978) 32

TABLE OF AUTHORITIES — Continued

Steffler v. *United States*, 319 U.S. 38 (1943) 28

Stuart v. *Laird*, 5 U.S. (1 Cranch) 299 (1803) 34

Things Remembered, Inc. v. *Petrarca*, 116 S. Ct. 494 (1995) 25

Tiedeman v. *Benson*, 122 F.3d 518 (8th Cir. 1997) . . . 43

United States v. *Apker*, 101 F.3d 75 (8th Cir. 1996) . . 20

United States v. *Beatty*, 232 U.S. 463 (1914) 31

United States v. *Carter*, 117 F.3d 262 (5th Cir. 1997) . 42

United States v. *Eyer*, 113 F.3d 470 (3d Cir. 1997) . . 20

United States v. *Gaudin*, 515 U.S. 506 (1995) 46

United States v. *Kunzman*, 125 F.3d 1363 (10th Cir. 1997) 42

United States v. *Lorentsen*, 106 F.3d 278 (9th Cir. 1997) 20

United States v. *McKinney*, 79 F.3d 105 (8th Cir. 1996) 4, 5

United States v. *McKinney*, 120 F.3d 132 (8th Cir. 1997) 5, 48-49

United States v. *Nixon*, 418 U.S. 683 (1974) . . . . *passim*

United States v. *Perez*, 129 F.3d 255 (2d Cir. 1997) . . 42

TABLE OF AUTHORITIES — Continued

United States v. *Rocha*, 109 F.3d 225 (5th Cir. 1997) . 20

United States v. *Ryan*, 41 F.3d 361 (1994) 47

United States v. *Shipp*, 203 U.S. 563 (1906) 17

United States v. *Skandier*, 125 F.3d 178 (3d Cir. 1997) 42, 43

United States v. *Sykes*, 977 F.2d 1242 (8th Cir. 1992). 4

United States v. *United Mine Workers*, 330 U.S. 258 (1947) 21

Walker v. *Wainwright*, 390 U.S. 335 (1968) 32

Webster v. *Doe*, 486 U.S. 592 (1988) 40

Will v. *United States*, 389 U.S. 90 (1967) 23

Statutes and Regulations

Act of March 3, 1891, ch. 517, § 6, 23 Stat. 828 12

Act of March 10, 1908, ch. 76, 35 Stat. 40 36

Act of Feb. 13, 1925, ch. 229 § 6(d), 43 Stat. 940 . . . 37

Act of Feb. 13, 1925, ch. 229 § 238, 43 Stat. 938 19

Act of Feb. 13, 1925, ch. 229 § 240, 43 Stat. 938-939 13

18 U.S.C. § 922(g) 3

TABLE OF AUTHORITIES — Continued

18 U.S.C. § 924 . . . . . *passim*

21 U.S.C. § 841(a) 3

21 U.S.C. § 845(a) 3

28 U.S.C. § 43 18

28 U.S.C. § 1254(1) . . . . . *passim*

28 U.S.C. § 1254(2) 15

28 U.S.C. § 1291 24

28 U.S.C. § 1651 . . . . . *passim*

28 U.S.C. § 1653 27

28 U.S.C. § 2244 . . . . . *passim*

28 U.S.C. § 2253 . . . . . *passim*

28 U.S.C. § 2254 . . . . . *passim*

28 U.S.C. § 2255 . . . . . *passim*

FED. R. APP. P. 22 . . . . . 6, 19

Supreme Court Rule 15.1 ' 39

Supreme Court Rule 20.1 29

TABLE OF AUTHORITIES — Continued

Miscellaneous

BLACK'S LAW DICTIONARY (1891) 18

BLACK'S LAW DICTIONARY (6th ed. 1991) 18

EIGHTH CIRCUIT MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 6.18.924 (1994) 4

RICHARD FALLON, DANIEL MELTZER & DAVID SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (4th ed. 1996) 16

Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) . . . 40

Note, *Federal Court Review By Extraordinary Writ: A Clogged Safety Valve in the Final Judgment Rule*, 63 YALE L.J. 105 (1953) 28

Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUPREME COURT REVIEW 153 . . . 29, 31-32

Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157 (1960) 40

REYNOLDS ROBERTSON & FRANCIS R. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (1936) 15

TABLE OF AUTHORITIES — Continued

REYNOLDS ROBERTSON & FRANCIS R. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (R. Wolfson & P. Kurland ed.1951) 32

ROBERT L. STERN & EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE (7th ed. 1993) 39

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) 19

Richard F. Wolfson, *Extraordinary Writs in the Supreme Court Since Ex Parte Peru*, 51 COLUMBIA LAW REVIEW 977, 981 (1951) 27

17 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD COOPER, FEDERAL PRACTICE AND PROCEDURE § 4036 (2d ed. 1988) 15, 16

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (J.A. 41) is reported at 99 F.3d 892. The order denying rehearing en banc (J.A. 49) over the dissent of Judges Beam, Hansen, Loken, and McMillian is unreported. The opinion of the district court denying petitioner's motion under 28 U.S.C. § 2255 (J.A. 37) is unreported.

JURISDICTION

The court of appeals entered judgment on November 4, 1996. Rehearing was denied on February 10, 1997. A petition for a writ of certiorari was filed on May 12, 1997, and granted on October 31, 1997. For the reasons explained below, this Court has jurisdiction under 28 U.S.C. §§ 1254(1), 1651, and 2253.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of 28 U.S.C. §§ 1254, 1651, 2244 and 2253 and 18 U.S.C. § 924 are reproduced in an appendix to this brief.

STATEMENT

Petitioner Arnold Hohn was convicted and is presently in federal custody for conduct — purportedly "using" a firearm in violation of 18 U.S.C. § 924(c) by merely having it "available" during the possession of a controlled substance — that this Court held in *Bailey* v. *United States*, 116 S. Ct. 501 (1995), is not a crime. After learning of the *Bailey* decision, Hohn filed his first and only motion pursuant to 28 U.S.C. § 2255 seeking collateral relief.

In response, the government conceded that the jury instruction given at Hohn's trial defining the term "use" in Section 924(c) was erroneous under *Bailey*. But the district court refused to consider the merits of Hohn's motion, holding — under a waiver doctrine that the Eighth Circuit and the

government have since renounced — that the claim was barred by Hohn's failure to anticipate this Court's decision in *Bailey*. J.A. 37. Hohn filed a timely notice of appeal, and the case was docketed in the court of appeals and assigned to a panel. J.A. 1, 40. But the court of appeals also declined to consider the merits of Hohn's claim, relying on a provision of the newly enacted Anti-terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2253(c). That provision allows an appeal to be taken from the denial of a first Section 2255 motion only upon the issuance of a "certificate of appealability," which in turn requires "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The court held over a dissent that Hohn's claim involved the denial of a "statutory" rather than a "constitutional" right. J.A. 41-42.

Hohn petitioned for a writ of certiorari to determine whether the court of appeals erred in denying Hohn's application for a certificate of appealability and whether Hohn was entitled to relief. The government again confessed error, conceding that the court of appeals had erred in holding that Hohn had not claimed a denial of his constitutional rights. The government recommended that this Court grant certiorari, vacate the judgment of the court of appeals, and remand the case for further proceedings. The Court granted certiorari limited to the question whether the court of appeals' refusal to issue a certificate of appealability deprives this Court of jurisdiction to act in accordance with that recommendation.

1. On June 20, 1990, police searched Hohn's home after an informant told them that Hohn was selling methamphetamine. They found three firearms near methamphetamine in the kitchen, two firearms in a box in the kitchen, and one firearm a few feet away from methamphetamine in the bedroom. Tr. 163-168, 212, 418-420. In Hohn's bedroom, the police also observed a wall-mounted gun case containing a collection of rifles and shotguns. Tr. 508-509. When the police arrested him in his living room, Hohn was not carrying any weapon, and no weapons were found in the living room. J.A. 43; Tr. 367-368.

Hohn was indicted for possession of firearms by a felon under 18 U.S.C. §§ 922(g) and 924(a); possession of a controlled substance near a school with intent to distribute it, under 21 U.S.C. §§ 841(a) and 845(a); and "us[ing] or carr[ying] a firearm" "during and in relation to" the drug offense, under 18 U.S.C. § 924(c)(1). At trial, however, no witnesses testified that they had observed Hohn use or carry any weapon "during and in relation to" the predicate drug offense. Hohn admitted possession of methamphetamine and firearms but testified that he owned the firearms because he is an avid hunter, and because his house had been repeatedly burglarized and vandalized. J.A. 44; Tr. 1107-1110. Only one witness, Cindy Vandry, testified to having purchased, or witnessed a purchase, of drugs from Hohn. Vandry acknowledged that she had never seen Hohn use or carry any weapon, and that the only weapons she had observed when she visited his home were located in a closed, wall-mounted gun case. Tr. 454-456.

Consistent with then-controlling Eighth Circuit precedent and Eighth Circuit Model Jury Instructions (see note 2, *infra*), the trial court gave the following instruction to the jury on the meaning of the terms "use" and "carry" in 18 U.S.C. § 924(c):

> The phrase "used a firearm" means having a firearm available to aid in the commission of possession of Methamphetamine with intent to distribute. Similarly, the phrase "carried a firearm" does not require proof of actual possession of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was available to provide protection in connection with the possession of Methamphetamine with intent to distribute or to facilitate success.

J.A. 10. The court overruled an objection that the instruction "allowed the jury to find that merely having a firearm available" nearby during a drug offense constitutes "use." J.A. 7-9.

Hohn was convicted on all three counts of the indictment and in July 1992 was sentenced to incarceration for 90 months

— 30 months for other crimes and 60 months (to be served consecutively) for the Section 924(c) conviction. Hohn was incarcerated for several years solely based on his conviction for "using or carrying" a firearm in violation of Section 924(c). He was released from prison on October 30, 1997, but remains in the custody of the Federal Bureau of Prisons under a program of home confinement that significantly restricts his liberty.[1]

2. Hohn appealed to the Eighth Circuit but did not challenge the "use or carry" jury instruction or his conviction under Section 924(c). At the time of his direct appeal, the Eighth Circuit — like most other courts — repeatedly had interpreted the term "use" in Section 924(c) expansively to include the "mere presence and availability" of a firearm in a house in which drugs were discovered.[2] Thus, the jury instruction given at Hohn's trial was consistent with settled Eighth Circuit law, and any argument to the contrary would have been rejected as frivolous. Hohn's conviction was affirmed on direct appeal. J.A. 12-26.

3. Several years later, this Court decided *Bailey*, substantially narrowing the range of conduct deemed criminal under Section 924(c)'s "use" prong. The Court held that, to "use" a firearm within the meaning of Section 924(c), a person must "active[ly] employ[]" it by "brandishing, displaying, bartering, striking with, * * * firing or attempting to fire" the weapon. 116 S. Ct. at 508. The Court explicitly repudiated decisions, like the Eighth Circuit's, in which the only nexus required between a firearm and a drug offense was the "availability," "accessibility," or "proximity" of the firearm to the defendant during the offense. *Id.* at 506, 508.

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[1] As a parolee in the Home Confinement program, Hohn remains in federal custody. See *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963).

[2] See *United States* v. *McKinney*, 79 F.3d 105, 108-109 (8th Cir. 1996). *E.g.*, *United States* v. *Sykes*, 977 F.2d 1242, 1248 (8th Cir. 1992). Accord EIGHTH CIRCUIT MANUAL OF CRIMINAL MODEL JURY INSTRUCTIONS § 6.18.924, at 197-199 & n.9 (1994).

Because Hohn had neither "used" a firearm as this Court interpreted that term in *Bailey*, nor "carried" one during and in relation to a drug offense, and hence was incarcerated for conduct that Section 924(c) does not criminalize, he moved on January 24, 1996, to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.[3] The government conceded in response that the jury instruction at Hohn's trial on firearm "use" was invalid under *Bailey*. J.A. 32. Nevertheless, the district court dismissed Hohn's motion because, in its view, Hohn had knowingly and intentionally "waived" his right to relief by failing to "raise his *Bailey* claim" on direct appeal, several years before *Bailey* was decided. J.A. 37. The district court relied (*ibid.*) on the Eighth Circuit's decision in *United States* v. *McKinney*, 79 F.3d 105, 109 (8th Cir. 1996).[4] The district court neither explored the applicability of doctrines (such as cause and prejudice, or fundamental miscarriage of justice) under which a "waiver" (or procedural default) has traditionally been excused, nor examined the merits of Hohn's claims.

4. Several months after Hohn filed his Section 2255 motion, on April 24, 1996, the President signed into law the AEDPA. The new law modified 28 U.S.C. § 2253 to require, for the first time, that federal prisoners obtain a "certificate of appealability" as a predicate to an "appeal * * * from * * * the

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[3] In his Section 2255 motion, Hohn argued, among other things, that: "his conduct was not a violation of 18 U.S.C. § 924(c)(1) as interpreted by *Bailey*," "a fundamental miscarriage of justice would result unless the court addressed the issue," "he should not be penalized for not raising the issue on direct appeal because he relied on years of Eighth Circuit precedent," and "he was prejudiced by the jury instruction" defining "firearms use." J.A. 44.

[4] After the petition for certiorari was filed in this case, this Court vacated and remanded (117 S. Ct. 1816 (1997)) the Eighth Circuit's judgment in *McKinney* for reconsideration in light of *Johnson* v. *United States*, 117 S. Ct. 1544, 1549 (1997). On remand, the Eighth Circuit abandoned its prior waiver doctrine, applied the plain error doctrine, and granted McKinney relief. *United States* v. *McKinney*, 120 F.3d 132 (1997).

final order in a proceeding under section 2255." It provides that a certificate may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Hohn filed a timely notice of appeal from the district court's dismissal of his Section 2255 motion on July 29, 1996. J.A. 40. On August 13, 1996, Hohn's "case [was] docketed" in the court of appeals. J.A. 4. Apparently assuming that the AEDPA applied to Hohn's case, the court of appeals construed the notice of appeal as an application for a certificate of appealability (*id.*) pursuant to amended Federal Rule of Appellate Procedure 22(b). The "case [was] submitted to a panel" of three judges. *Id.* In a published opinion, the panel majority denied Hohn's request for a certificate of appealability over the vigorous dissent of Judge McMillian. The majority asserted that the AEDPA's requirement of a "substantial showing of the denial of a constitutional right" (28 U.S.C. § 2253(c)(2)) was not satisfied because, in its view, "petitioner is not making a constitutional claim" but rather only "a claim to a federal statutory right." J.A. 41-42. In support of that proposition, the majority observed that this Court in *Bailey* "interpret[ed] a statute." *Id.* at 42. The majority rejected the argument that the Constitution forbids the government to incarcerate an individual for conduct that is not criminal. It reasoned: "The Constitution does not guarantee that judges will always be right." *Ibid.* The panel did not address Hohn's constitutional challenge to the erroneous jury instruction at all.

In dissent, Judge McMillian argued that Hohn's claim is clearly rooted in the Fifth Amendment's Due Process Clause. J.A. 46-48. He explained that the Due Process Clause forbids incarceration of a person based on a conviction for conduct that this Court has determined is not criminal. *Id.*

Hohn sought rehearing and rehearing en banc, arguing that his Section 2255 motion was premised on his due process rights (1) not to be incarcerated for conduct that does not constitute a crime; and (2) to be convicted only upon proof beyond a

reasonable doubt of each and every element of a crime. Reh'g Pet. 7-9. The court denied Hohn's petition with Judges Beam, Hansen, Loken, and McMillian voting for rehearing. J.A. 49.

5. Hohn filed a petition for a writ of certiorari on May 12, 1997. Hohn's first question challenged the panel majority's holding that a certificate of appealability could not issue because his claim involved the denial of a "statutory," rather than a "constitutional," right. Hohn also requested that the Court reach the merits of the appeal the Eighth Circuit had declined to allow, by considering the scope of the "carry" prong of 18 U.S.C. § 924(c) and the validity of the Eighth Circuit's waiver doctrine in light of *Johnson* v. *United States*, 117 S. Ct. 1544 (1997). See note 4, *supra*.

The government confessed error, "agree[ing] that claims of the kind raised by petitioner in his motion under Section 2255 may fairly be characterized as 'constitutional,' and that the court of appeals erred in concluding otherwise." U.S. Resp. 7. It suggested that "the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded" (*id.* at 15) to allow the Eighth Circuit to decide whether Hohn's concededly constitutional claims were "substantial" within the meaning of Section 2253(c)(2) (*id.* at 9-10).

The government also observed that, after Hohn's certiorari petition was filed, this Court had announced its decision in *Lindh* v. *Murphy*, 117 S. Ct. 2059 (1997). In *Lindh*, the Court held that the AEDPA "reveals Congress's intent to apply the amendments to chapter 153," which include the certificate-of-appealability requirement, "only to such cases as were filed after the statute's enactment." *Id.* at 2063. Hohn's case was filed in the district court before the effective date of the AEDPA. Nonetheless, the government urged the Court not to grant certiorari to consider whether, under *Lindh*, the certificate-of-appealability requirement was applicable to Hohn's case. It argued that Hohn's "case is subject to the Act's certificate of

appealability requirement because the *appeal*" — which, the government maintained, is "the relevant case" rather than the "original 'case' filed in the district court" (U.S. Resp. 11 (emphasis added)) — was filed after the Act's effective date.[5]

In reply, Hohn argued that a remand to determine the substantiality of the constitutional question was unnecessary and the Court should summarily reverse the decision to withhold a certificate of appealability. Pet. Reply Br. 2-7. He further argued that summary reversal was appropriate because, in light of *Lindh*, no certificate was required in his case. *Id.* at 8-9.

On October 31, 1997, this Court granted Hohn's petition for certiorari limited to the following question: "In light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Acting Solicitor General?" J.A. 50.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the power of this Court to review improper refusals by courts of appeals to allow statutorily authorized appeals. For Hohn, it implicates the power of the Court to correct a series of egregious judicial errors that have deprived him of even one collateral review on the merits of his claims — which the government has all but admitted to be meritorious — that his incarceration is unlawful and that he is innocent of the crime of which he was convicted.

This Court ruled in *House* v. *Mayo*, 324 U.S. 42, 44 (1945), that it has jurisdiction under the All Writs Act (now codified at 28 U.S.C. § 1651) to correct such an erroneous decision by a court of appeals "declining to allow an appeal" to it

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[5] The government also suggested that review of the applicability of the certificate requirement was unwarranted because it "is unlikely * * * to be determinative of the appeal in this case" (U.S. Resp. 13) — perhaps because Hohn's entitlement to a certificate of appealability is clear.

for lack of a certificate of probable cause. The Court has routinely exercised that power, and apparently also its statutory certiorari power under 28 U.S.C. § 1254, in cases procedurally identical to Hohn's for more than half a century.

The Court should not reverse that undoubtedly correct construction of its common-law certiorari power now. Use of the writ in this circumstance is fully consistent with the writ's traditional role as a tool for rectifying lower courts' errors in discerning the reaches of their own jurisdiction. The writ is a proper means of reinstating a case over which a lower court has improperly disavowed jurisdiction. It is "appropriate in aid of" the Court's own appellate jurisdiction (28 U.S.C. § 1651) because it prevents a lower court from pretermitting an appeal on the merits over which the Court would have appellate jurisdiction were it permitted to proceed.

Although the Court in *House*, and several Justices in later opinions, have questioned the Court's jurisdiction to issue *statutory* writs of certiorari to review decisions declining appeals, the Court nonetheless appears to have issued such writs frequently over the years. Because the brief discussion of the statutory certiorari power in *House* is flawed, contravenes the plain language of Section 1254, and appears to have been renounced by this Court in subsequent decisions, the Court should take this opportunity to confirm — as the Court's practice suggests — that the Section 1254 power extends to *all* judicial proceedings in the courts of appeals, including applications for certificates of appealability. Section 1254 gives this Court "a comprehensive and unlimited power" (*Forsyth* v. *Hammond*, 166 U.S. 506, 513 (1897)) to review by writ of certiorari "*any* * * * case" that is "in the circuit court of appeals." By its plain language, this provision authorizes the Court to review *any* judicial proceeding "in the courts of appeals." An application for a certificate of appealability — a request for relief upon which one or more judges of the court of appeals render a decision — is therefore itself a "case[] in the court[] of appeals," regardless whether the court of appeals decides to permit any "appeal * * * from

* * * the final order in a proceeding under section 2255" to "be taken." 28 U.S.C. § 2253(c)(1)(B).

This conclusion is confirmed by the Court's decisions in *United States* v. *Nixon*, 418 U.S. 683 (1974), and *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), which suggest that the statutory certiorari power extends to all cases in the courts of appeals over which they properly had jurisdiction. The court of appeals had jurisdiction over petitioner's application for a certificate of appealability for two reasons. First, Section 2253 expressly gives the judges of the courts of appeals the jurisdiction (and duty) to adjudicate such applications. 28 U.S.C. § 2253(c). See *In re Burwell*, 350 U.S. 521 (1956). Second, courts of appeals *always* have the jurisdiction to decide whether they have jurisdiction over the merits of a proffered appeal. The jurisdictional question over the merits of a proffered appeal therefore is always properly "in the courts of appeals" and this Court therefore always has the power to reach it by issuing a statutory writ of certiorari. See *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982).

Section 2253 not only does not abrogate this Court's certiorari power over certificate decisions; it suggests a congressional design to affirm that power. When Congress amended the AEDPA, it was legislating against a background of more than half a century of Supreme Court decisions reversing courts of appeals' certificate decisions on writs of certiorari. That Congress was cognizant of this Court's practice is beyond dispute, as evidenced by Section 2244, an analogous gatekeeping provision monitoring access to district courts for successive habeas petitions. Congress expressly barred review of those Section 2244 gatekeeping decisions by "appeal[] * * * or * * * writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). In contrast, Section 2253 does not mention, let alone abolish, this Court's often-exercised certiorari power. Congress's decision expressly to ban certiorari review over gatekeeping decisions concerning successive habeas petitions strongly suggests that its failure to preclude certiorari review over gatekeeping decisions

concerning first petitions, like Hohn's, was intentional. See *Lindh*, 117 S. Ct. at 2064. Construction of the AEDPA in this manner also furthers its purpose of easing the burden of habeas petitions upon this Court by ensuring one full, fair review in the courts below. Were the Court's certiorari power proscribed, its capacity to correct circuit-wide errors and conflicts in applying the statutory standards for certificate issuance would be impaired. The Court may expect to be flooded with meritorious original applications for certificates that the lower courts have improperly rebuffed.

Regardless of the outcome of that question about the Court's certiorari power where a certificate to appeal has been denied, it is now apparent that the Court has jurisdiction to grant, vacate, and remand because petitioner was not required to obtain any certificate to pursue his appeal. This Court decided in *Lindh* v. *Murphy*, after Hohn's petition for certiorari was filed, that Chapter 153 of the AEDPA, which includes the certificate requirement, is applicable only to habeas "cases [that] had been filed after the date of the Act." *Id.* at 2063. Hohn's case was filed before the Act and consequently should be remanded to permit his appeal on the merits to proceed.

Finally, if the Court overrules *House* v. *Mayo* and holds that it lacks jurisdiction to review the decision below, petitioner respectfully requests that the Court or any individual Justice issue a certificate of appealability. See *Davis* v. *Jacobs*, 454 U.S. 911, 913-914 (1981) (opinion of Stevens, J.).

ARGUMENT

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1254(1) TO ISSUE A WRIT OF CERTIORARI

Section 1254 of Title 28 authorizes this Court to exercise review over "[c]ases in the courts of appeals" through two methods. First, the Court may exercise jurisdiction "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or

decree." 28 U.S.C. § 1254(1). Second, this Court may exercise jurisdiction over "[c]ases in the courts of appeals" by "certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy." 28 U.S.C. § 1254(2). This case concerns the meaning of the grant of statutory certiorari jurisdiction under Section 1254(1).

Despite the frequency with which this Court has exercised jurisdiction under Section 1254(1), it has never clearly delineated the outer boundaries of its authority under that provision. Shortly after the precursor to Section 1254(1) was enacted in 1891, this Court described Congress's grant of certiorari authority in broad terms as "a comprehensive and unlimited power." *Forsyth*, 166 U.S. at 513.[6] The Court noted that "[u]p to the time of the passage of the act of 1891, creating the circuit courts of appeal, the theory of federal jurisprudence had been a single appellate court, to wit, the supreme court of the United States, by which a final review of *all cases* of which the lower federal courts had jurisdiction was to be made." *Id.* at 511-512 (emphasis added). The 1891 Act assigned the newly

[6] The Court was describing Section 6 of the Evarts Act, which conferred jurisdiction upon the newly created circuit courts of appeals to hear certain appeals from the federal trial courts and further provided that "in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." Act of Mar. 3, 1891, ch. 517, § 6, 23 Stat. 828. In *American Constr. Co.* v. *Jacksonville Ry. Co.*, 148 U.S. 372 (1893), this Court interpreted the statute's reference to "case[s] * * * *made final* in the circuit court of appeals" extremely broadly, holding that it signified "cases in which the statute makes the judgment of that court final; not [ ] cases in which that court has rendered a final judgment." *Id.* at 385 (emphasis added).

created courts of appeals authority to decide appeals, but it vested in this Court a "broad and comprehensive" power to review by writ of certiorari all cases in the courts of appeals. *Id.* at 513. Focusing on the language of the certiorari provision (see note 6, *supra*), the Court explained:

> It applies to every case in which but for it the decision of the circuit court of appeals would be absolutely final * * *. Unquestionably the generality of this provision was not a mere matter of accident. It expressed the thought of congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the court of appeals. It may be issued *before or after any decision by that court, and irrespective of any ruling or determination therein.* All that is essential is that there be a case pending in the circuit court of appeals * * *.

Forsyth, 166 U.S. at 513 (emphasis added). "[T]he power of this court in certiorari," the Court concluded, "extends to every case pending in the circuit courts of appeal, [and] * * * is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal." *Id.* at 514.

Fifty years later, Congress had *expanded* the language of the certiorari statute.[7] Yet this Court, in *House* v. *Mayo*, 324 U.S. 42 (1945) (per curiam), endorsed without analysis a dra-

[7] Section 240(a) of the Act of February 13, 1925, commonly known as the Judges Bill, provided: "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by writ of error or appeal." Act of Feb. 13, 1925, ch. 229, § 240(a), 43 Stat. 938-939.

matically constricted understanding of its statutory certiorari jurisdiction, under which the court of appeals' decision that it did not have jurisdiction over an appeal insulates its entire decision — including its refusal to accept jurisdiction — from statutory certiorari review. *House* involved a state prisoner who was denied federal habeas corpus and a certificate of probable cause[8] by the district court, and whose application for leave to appeal in forma pauperis was denied by the court of appeals because he failed to present a certificate of probable cause. *Id.* at 43-44. This Court opined that it "cannot issue a writ of certiorari in the present case under § 240(a) of the Judicial Code." *Id.* at 44. The Court's entire analysis was as follows:

> Our authority under [section 240(a)] extends only to cases "in a circuit court of appeals, or in the (United States) Court of Appeals for the District of Columbia." Here the case was never "in" the court of appeals, for want of a certificate of probable cause.

Ibid.[9] The Court nevertheless held that it had jurisdiction under the All Writs Act, currently codified at 28 U.S.C. § 1651, to grant a writ of certiorari to "review the action of the court of appeals in declining to allow an appeal to it" for lack of a certificate. The Court also held that the All Writs Act

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[8] "Certificates of probable cause" are the precursors of the "certificates of appealability" required by the AEDPA and are functionally indistinct for most relevant purposes. Before enactment of the AEDPA, Section 2253 required State prisoners to obtain a "certificate of probable cause" to appeal from a denial of a federal habeas petition. The AEDPA extended that requirement to federal prisoners and codified the standard for its issuance articulated in *Barefoot* v. *Estelle*, 463 U.S. 880, 893 n.4 (1983), requiring a "substantial showing of the denial of [a] federal right."

[9] The per curiam opinion in *House* cites as support for the conclusion that there is no authority to issue a statutory writ of certiorari the per curiam decision in *Ferguson* v. *District of Columbia*, 270 U.S. 633 (1926), which consists of a single paragraph and, like *House*, contains no analysis.

authorized it to reach the merits of the appeal the lower court had improperly declined to permit. *House*, 324 U.S. at 44.

A decade later, in *In re Burwell*, 350 U.S. 521 (1956), the Court implicitly *rejected* the construction of Section 1254 endorsed in *House* — *i.e.*, that a court of appeals' decision denying leave to appeal insulates that decision from review under the Court's statutory certiorari power. In *Burwell*, the Court exercised jurisdiction over questions certified by the Ninth Circuit under the predecessor to 28 U.S.C. § 1254(2) — which, like Section 1254(1), applied only to "cases in the courts of appeals" — in a case in which the court of appeals had dismissed applications for leave to appeal.[10] Thus, under *Burwell*, the court of appeals' erroneous decision to decline jurisdiction over an appeal was no bar to this Court's review of that predicate decision on a statutory writ of certiorari.

After *Burwell*, the Court routinely, without specifying the source of its jurisdiction, issued writs of certiorari to review denials of leave to appeal despite the petitioner's failure to follow the Court's then-applicable procedures for obtaining extraordinary writs, which required a separate motion requesting leave to file a petition.[11] The Court has similarly exercised jurisdiction, without comment as to its source, in a large number

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[10] The likelihood that the Court overlooked the question whether it had jurisdiction to decide the certified questions is slim: "This court has * * * been careful not to exceed its lawful jurisdiction in this class of [certified question] cases." *Jewell* v. *Knight*, 123 U.S. 426, 433 (1887). See REYNOLDS ROBERTSON & FRANCIS R. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 124, at 222 (1936).

[11] See 17 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4036 at 14 n.12 (2d ed. 1988) (citing *Head* v. *California*, 374 U.S. 509 (1963)). See also, *e.g.*, *Humphrey* v. *Cady*, 405 U.S. 504 (1972); *Jennings* v. *Ragen*, 358 U.S. 276 (1959) (per curiam). The Court abandoned that requirement in 1980. See 17 WRIGHT, MILLER & COOPER, *supra*, § 4036 at 14 n.12.

of denial-of-leave-to-appeal cases in which the petitioner invoked solely the Court's statutory writ jurisdiction.[12]

Finally, in *United States* v. *Nixon*, *supra*, and *Nixon* v. *Fitzgerald*, *supra*, this Court held that the question whether a case is "in the court[] of appeals" under Section 1254(1) hinges not on what the court of appeals *actually did* but on what it *had the jurisdictional power to do*. The *Nixon* cases, like *Burwell*, thus suggest (contrary to *House*) that any case over which the court of appeals could properly have exercised its jurisdiction was "in the court[] of appeals," the court of appeals' own decision to the contrary notwithstanding.

As the foregoing makes plain, this Court's understanding of the reaches of the statutory certiorari power has fluctuated. This case presents the Court with an opportunity to clarify that the expansive construction of the statutory certiorari power the Court initially endorsed (and presently exercises) is the correct one — and indeed the only one to which the language of the statutory text is amenable.[13]

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[12] See, *e.g.*, *Lynce* v. *Mathis*, 117 S. Ct. 891 (1997) (certificate of probable cause); *Lozada* v. *Deeds*, 498 U.S. 430 (1991) (same); *Selvage* v. *Collins*, 494 U.S. 108 (1990) (same); *Graham* v. *Lynaugh*, 492 U.S. 915 (1989) (same); *Allen* v. *Hardy*, 478 U.S. 255 (1986) (same); *Nowakowski* v. *Maroney*, 386 U.S. 542 (1967) (in forma pauperis); *Phelper* v. *Decker*, 385 U.S. 18 (1966) (same); *Ellis* v. *United States*, 356 U.S. 674 (1958) (same); *Farley* v. *United States*, 354 U.S. 521 (1957) (same); *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948) (same).

[13] Several commentators have questioned the assumption that the Court lacks statutory certiorari jurisdiction to review denials of certificates of probable cause. See, *e.g.*, RICHARD FALLON, DANIEL MELTZER & DAVID SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 1680 (4th ed. 1996) (questioning the proposition that denials of certificates of probable cause are not "in" the courts of appeals and observing that the Court has exercised its certiorari power to review other cases over which the courts of appeals lacked jurisdiction); 17 WRIGHT, MILLER & COOPER, *supra*, § 4036, at 16 (1988) (opining that "statutory (continued...)

A. The Plain Language Of The Statute Confers Jurisdiction Over Any "Case[] In The Court[] Of Appeals"

By its plain meaning, Section 1254(1) authorizes review of the Eighth Circuit's decision rejecting petitioner's application for a certificate of appealability. The language of the statutory grant is broad and inclusive: "*Cases in the courts of appeals* may be reviewed by the Supreme Court by * * * writ of certiorari granted upon the petition of *any* party to *any* civil or criminal *case*, *before or after* rendition of judgment or decree." 28 U.S.C. § 1254(1) (emphasis added).

Section 1254(1) contains no restrictions as to the kinds of "case" the Court may review: it sets forth no requirements as to the procedural posture the "case" must be in, the sort of questions the "case" may present, or the nature of the decision, if any, the court of appeals must have rendered. As this Court correctly explained in *Forsyth*, the "power thus given is not affected by the condition of the case as it existed in the court of appeals" and "may be exercised before or after *any decision* by that court, and *irrespective of any ruling or determination therein*." 166 U.S. at 513 (emphasis added). See *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 468 U.S. 1315, 1318 (1984) (Rehnquist, J., in chambers) ("*Every* decision of a United States district court or of a court of appeals is reviewable by this Court either by way of appeal or by certiorari. §§ 1252-1254; cf. § 1291.") (emphasis added). Cf. *United States* v. *Shipp*, 203 U.S. 563, 573 (1906) ("even if the circuit court had no jurisdiction * * * and if this court had no jurisdiction of the appeal, this court, and this court alone, could

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[13] (...continued)
certiorari should be available" to review denials of certificates of probable cause" because "[l]eave to appeal can be denied only after the court of appeals has so far considered the merits of the questions presented as to have brought the case within any reasonable purpose of the requirement that it be in that court").

decide that such was the law"). In short, "the sole essential of this Court's jurisdiction to review is that there be a case pending in the circuit court of appeals." *Gay* v. *Ruff*, 292 U.S. 25, 30 (1934).

The proceedings in the Eighth Circuit plainly qualify as a "case." Since 1891, when Congress enacted the precursor to Section 1254, the word "case" has been understood as "[a] general term for an action, cause, suit, or controversy, at law or in equity." BLACK'S LAW DICTIONARY 175 (1891); BLACK'S LAW DICTIONARY 215 (6th ed. 1990). The term encompasses "any proceeding judicial in its nature." *Ibid.* See *Blyew* v. *United States*, 80 U.S. (13 Wall.) 581, 595 (1871) ("The words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning *a proceeding in court*, a suit, or action.") (emphasis added); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 112-113 (1866) (holding that the interchangeable term "suit" "is certainly a comprehensive one, and appl[ies] to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him"). Cf. *In re Quirin*, 317 U.S. 1, 24 (1942) (mere "[p]resentation of [a] petition for judicial action is the institution of a suit"). There can be no serious dispute that what occurred in the court of appeals was a "proceeding judicial in its nature" and therefore a "case" within the meaning of Section 1254(1).

Nor can there be any doubt that the judicial proceeding that resulted in the Eighth Circuit's published opinion took place before a "court of appeals." The courts of appeals are the intermediate federal appellate courts, which "consist of the circuit judges of the circuit." 28 U.S.C. § 43. See BLACK'S LAW DICTIONARY 355 (6th ed. 1991). The action of the Eighth Circuit panel in this case (not to mention the denial of the suggestion

for rehearing by the en banc court) undeniably was the action of a "court of appeals" within the meaning of Section 1254(1).[14]

Although this Court in *House* v. *Mayo* suggested otherwise, it is difficult to understand how the "case" that was plainly before the court of appeals could not be "in" that court. Contrary to the suggestion of *House*, there is no talismanic significance to Section 1254(1)'s reference to cases "*in* the courts of appeals." Instead, that phrase is intended merely to indicate where the proceedings are occurring. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1139 (1986) (the word "in" "indicate[s] location or position"). It is possible that the phrase also is intended to distinguish cases that are subject to the Court's certiorari power under Section 1254 from cases that are decided by "a district court" and are subject to the Court's appellate power under Section 1253. See 28 U.S.C. § 1253; Act of Feb. 13, 1925, ch. 229, § 238, 43 Stat. 938.

Thus, under the plain meaning of Section 1254(1), a "case" is "in the court[] of appeals" when a request for legal relief is lodged there and a judicial proceeding ensues. The proceedings below easily satisfied these minimal requirements. As the court of appeals' docket sheet demonstrates, petitioner filed a notice of appeal, which the court of appeals treated as an application for a certificate pursuant to Federal Rule of Appellate Procedure 22(b) (J.A. 4); petitioner's "case" was then "docketed" in the court of appeals as case No. 96-3118 (*id.*); the "case [was] submitted to a panel" for consideration and decision (*id.*); "the

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[14] Even in a case in which the application for a certificate of appealability is ruled on by a single circuit judge rather than (as here) by a three-judge panel, the proceedings occur "in the court[] of appeals." This Court has held explicitly that Section 2253 vests jurisdiction to adjudicate applications for certificates of probable cause in the *courts of appeals*, notwithstanding that section's reference to circuit judges; and that Section 2253 grants *courts of appeals* discretion to choose whether that jurisdiction should be exercised by the court as a whole or by individual circuit judges. *In re Burwell*, 350 U.S. 521 (1956); see also F. R. A. P. 22(b).

court" considered the case and "filed [a published] opinion" that included a "dissent" (J.A. 5) and entered a "judgment * * * denying [the] application for [a] Certificate of Appealability" (*id.*); petitioner then submitted a "petition for rehearing with suggestion for rehearing en banc" (*id.*), to which the United States, after a "judge order" was entered granting it an extension of time (*id.*), filed an opposition (*id.*); the court entered an "order" denying the petition for rehearing, with four judges voting to grant it (J.A. 5-6); and the court "issued" its "mandate" (J.A. 6). "[A]t the end of the appellate proceedings," the record was returned by the court of appeals to the district court. *Id.* These proceedings were more than enough to create a case in the court of appeals.[15]

The minimal prerequisites for a "case[] in the court[] of appeals" are perfectly sensible, in view of the occasional need for this Court to grant review "before * * * judgment." 28 U.S.C. § 1254(1). In *United States* v. *Nixon*, *supra*, for example, this Court granted a statutory writ of certiorari to review a case in which the notice of appeal to the court of appeals and the certiorari petition were filed on the same day. *Id.* at 689-690. This Court held that there was a case in the court of appeals because "the appeal was timely filed and all other procedural requirements were met," and the court of appeals had jurisdiction to review the order from which the petitioner had appealed. *Id.* at 690. The same result is appropriate here. Were the Court to adopt a narrower construction, it might be precluded from exercising swift review in the occasional cases

[15] The court of appeals' own conviction that "the appellate proceedings" were a "case" is reflected throughout its docket sheets (J.A. 3-6), and in its treatment of its opinion in the case as binding circuit precedent. See *United States* v. *Apker*, 101 F.3d 75 (8th Cir. 1996), petition for cert. pending, No. 97-5460. Other circuits have relied on the panel's decision as well. See, *e.g.*, *United States* v. *Eyer*, 113 F.3d 470, 474 (3d Cir. 1997); *United States* v. *Rocha*, 109 F.3d 225, 227-228 n.2 (5th Cir. 1997); *Lozada* v. *United States*, 107 F.3d 1011, 1013 (2d Cir. 1997); *United States* v. *Lorentsen*, 106 F.3d 278, 279 (9th Cir. 1997).

that warrant such emergency treatment. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989); *Dames & Moore* v. *Regan*, 453 U.S. 654, 688 (1981); *United States* v. *United Mine Workers*, 330 U.S. 258, 269 (1947).

In sum, it is difficult to imagine what the proceeding below was if not a "case": it commenced with a request for legal relief the court of appeals had the power to grant; it entailed litigation; and it resulted in a judgment dramatically affecting a party's legal rights and an opinion that has precedential effect in other cases. It is equally difficult to divine where that case occurred if not "in" the court of appeals. It certainly did not occur "in" the district court: neither the record nor any of the legal briefs in that proceeding were physically lodged in the district court from the date on which the appeal was docketed in the court of appeals until the record was returned "at the end of the appellate proceedings"; and none of the pertinent orders or judgments that disposed of the proceedings on petitioner's application issued from the district court. J.A. 3-6. The proceedings in the Eighth Circuit thus clearly satisfy the plain language of Section 1254(1).

B. The Proceedings On An Application For A Certificate Of Appealability Are No Less A "Case[] In The Court[] Of Appeals" Because The Application Is An Original Proceeding Separate From The Merits Of The Appeal

1. This Court's decision in *House* v. *Mayo* rested on the unstated assumption that there can be no "case[] in the court[] of appeals" unless and until that court entertains the *merits* of the appeal. That assumption is false. Even if the Court's statement that "the case was never 'in' the court of appeals" (324 U.S. at 44) is correct as to the *appeal from the district court's denial of habeas relief*, which Section 2253 forbade "for want of a certificate of probable cause," it is flatly incorrect as to the *application for a certificate of probable cause* itself.

Although Section 2253 expressly forbids a court to accept jurisdiction over an "appeal * * * from * * * the final order in a proceeding under section 2255," it simultaneously *confers jurisdiction* on the judges of the courts of appeals to determine whether a certificate of appealability should issue. 28 U.S.C. § 2253(c)(1) (authorizing "a circuit justice or judge [to] issue[] a certificate of appealability"). In terms of the "gatekeeping" metaphor (*Felker* v. *Turpin*, 116 S. Ct. 2333, 2337 (1996)), Section 2253 leaves the district court's merits decision at the gate of the court of appeals but allows the petitioner, armed with his request for a certificate of appealability, to enter the court of appeals to plead for the merits' admission. Thus, Section 2253 expressly authorizes the application for a certificate to be made "in the court[] of appeals" to a circuit judge or judges.

The fact that the certificate-of-appealability determination is in the court of appeals separately from the merits appeal poses no bar to this Court's statutory certiorari review. This Court has never interpreted "cases in the courts of appeals" to be limited to "cases on the merits," or "cases that include the merits." Indeed, the Court has often expressly recognized its statutory certiorari power to review cases in the courts of appeals that involve matters tangential to the merits, even when litigation of the merits is proceeding below. In *Nixon* v. *Fitzgerald*, 457 U.S. at 742, the Court rejected the argument that an appeal from an order denying a claim of immunity "was not an appealable 'case' properly in the court of appeals within the meaning of §1254." Similarly, in *United States* v. *Nixon*, this Court held that an appeal from a denial of a discovery motion was a case properly before the Court on a statutory writ of certiorari. And in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 109 (1964), the Court granted a statutory writ of certiorari to review a court of appeals' refusal to issue a writ of mandamus to reverse an intrusive discovery order entered by the district court.

2. The fact that an application for a certificate is not an appeal from a district court order, but rather is filed as an original matter in the court of appeals, can only help to bolster the proposition that the matter qualifies as a "case[] in the court[] of appeals." The plain language of Section 1254 appears carefully crafted *not* to limit certiorari jurisdiction to review of "appeals in the courts of appeals." Instead, the language is broad and general, giving this Court certiorari jurisdiction to review cases of *all* kinds that may arise "in the courts of appeals." For example, this Court granted statutory certiorari in *Schlagenhauf* to review the disposition of an original petition for mandamus filed in the court of appeals. 379 U.S. at 109. Indeed, this Court has often granted certiorari to review grants and denials of original petitions for writs of mandamus by the courts of appeals. See *Will* v. *United States*, 389 U.S. 90, 94-95 (1967) (granting certiorari to vacate a writ of mandamus); *Kerr* v. *United States District Court*, 426 U.S. 394, 401 (1976) (granting certiorari to affirm a denial of mandamus).[16] In sum, the fact that an application for a certificate of appealability is filed as an original matter in the court of appeals and is separate from and preliminary to the merits appeal does not deprive this Court of power to exercise jurisdiction under Section 1254(1).

C. Because Section 1254(1) Authorizes This Court To Review All Cases Over Which The Court Of Appeals Properly Has Jurisdiction, Certiorari Jurisdiction Exists In This Case

In its more recent decisions concerning the scope of Section 1254(1), the Court has implicitly repudiated *House* v. *Mayo* by suggesting that whether a case is "in the court[] of appeals" hinges not on whether the court of appeals actually accepted jurisdiction but on whether it should have. In *Nixon* v. *Fitzgerald*, 457 U.S. at 743, the Court held that because the

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[16] Although the Court did not specifically invoke Section 1254(1) as the source of its certiorari jurisdiction in those cases, neither did it suggest that it had concluded the cases were appropriate for issuance of an extraordinary writ pursuant to the All Writs Act.

"petitioner [had] presented a[n] * * * appealable question to the Court of Appeals[, i]t follow[ed] that the case was 'in' the Court of Appeals under § 1254 and properly within [its] certiorari jurisdiction" even though the court of appeals had determined that it lacked jurisdiction. Similarly, in *United States* v. *Nixon*, 418 U.S. at 690, the Court held that "the petition [for certiorari] is properly before this Court for consideration if the District Court order was final" and therefore within the appellate jurisdiction of the court of appeals under 28 U.S.C. § 1291. These decisions suggest that the Court considers the court of appeals' jurisdiction to be a prerequisite to its own statutory certiorari jurisdiction.[17]

As we next demonstrate, although there are several ways in which the approach of the *Nixon* cases could be applied here, the result is in each case the same: this Court has statutory certiorari jurisdiction to review the proceedings below. *First*, the court of appeals properly had jurisdiction because Section 2253 expressly vests it with jurisdiction to consider applications for certificates of appealability. *Second*, this Court's precedents confirm that all jurisdictional determinations (such as those made by courts of appeals pursuant to Section 2253) are reviewable regardless of the decision reached by the court of appeals.

1. Section 2253 expressly gives the judges of the courts of appeals jurisdiction to receive and decide applications for certificates of appealability. Indeed, this Court has held that courts of appeals not only may, but must, accept the jurisdiction Section 2253 confers on them to decide such applications. In *In re Burwell*, the Court explained why, on writ of certiorari, it had reversed the dismissal of applications for certificates: "[t]he Ninth Circuit was in error in deeming itself without jurisdiction

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[17] We submit that this newer approach, while an improvement on *House* v. *Mayo*, is hardly compelled by the language of Section 1254, which refers to "cases in the courts of appeals," not to "cases *properly* in the courts of appeals." Congress could have written the statute to require that the courts of appeals properly have jurisdiction, but did not.

to entertain applications for certificates of probable cause, under 28 U.S.C. § 2253." 350 U.S. at 522. See also *House* v. *Mayo*, 324 U.S. at 48 (holding that "the judges of [the court of appeals] erred in not considering whether the case was an appropriate one for a certificate of probable cause"). Because the court of appeals properly had jurisdiction over the application for a certificate of appealability, there was a "case[] in the court[] of appeals" under the *Nixon* doctrine.

2. The court of appeals also properly had jurisdiction over the application for a certificate of appealability because this Court always has jurisdiction to review a court of appeals' jurisdictional decision. As just explained (at 24), *Nixon* v. *Fitzgerald*, *supra*, stands for the proposition that this Court may grant a writ of certiorari under Section 1254 to reverse or vacate a court of appeals' incorrect dismissal of a case for lack of jurisdiction. The Court strongly suggested in *Nixon* v. *Fitzgerald* that it may issue a statutory writ of certiorari to review a court of appeals' decision denying jurisdiction even if that decision was correct. The Court declared: "[t]here can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction — a power we have exercised routinely." *Id.* at 743 n.23. In support of that proposition, the Court cited its decision in *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) — a case in which the Court, on a writ of certiorari, had affirmed the court of appeals' dismissal of an appeal for lack of jurisdiction. *Id.* at 478-479, 482.[18]

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[18] Similarly, this Court recently exercised its certiorari jurisdiction to affirm the decision of a court of appeals dismissing an appeal over which, because of a statutory bar (28 U.S.C. § 1447), it lacked jurisdiction. See *Things Remembered, Inc.* v. *Petrarca*, 116 S. Ct. 494 (1995). In that case, the petitioner had invoked solely 28 U.S.C. § 1254 in support of this Court's certiorari jurisdiction, and respondent disputed this Court's jurisdiction. This Court also has routinely granted writs of certiorari to reverse and vacate decisions of the courts of appeals erroneously

(continued...)

These decisions demonstrate that the Court has statutory certiorari jurisdiction to review *any* jurisdictional decision of the courts of appeals, regardless of its outcome, and regardless whether that jurisdictional decision was correct. Federal courts have the power (and duty) to determine their jurisdiction in every case. *Carden* v. *Arkoma Assocs.*, 494 U.S. 185, 195 (1990) (federal courts are "always called upon to decide" any "jurisdictional requirement[s]") (internal quotation marks omitted); *Mansfield, C. & L.M. Ry. Co.* v. *Swan*, 111 U.S. 379, 382 (1884). Jurisdictional questions therefore are always properly "in the court[] of appeals" under the *Nixon* doctrine and this Court therefore always has statutory certiorari jurisdiction to review such determinations. If, on review, the Court concludes that the court of appeals had jurisdiction to decide the merits, the merits case also was properly "in" the court of appeals and subject to this Court's statutory certiorari jurisdiction, notwithstanding the lower court's erroneous holding to the contrary. See *Nixon* v. *Fitzgerald*, 457 U.S. at 743 n.23.

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[18] (...continued)
exercising jurisdiction over the merits of cases that were not properly in the court of appeals. See *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976) (vacating for want of jurisdiction court of appeals judgment affirming a non-final order); *Richardson-Merrell, Inc.* v. *Kohler*, 472 U.S. 424 (1985) (vacating for want of jurisdiction court of appeals judgment reversing interlocutory district court order disqualifying counsel); *Flanagan* v. *United States*, 465 U.S. 259 (1984) (reversing for want of jurisdiction court of appeals judgment affirming interlocutory district court order disqualifying counsel); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981) (vacating for want of jurisdiction court of appeals judgment affirming interlocutory district court order denying disqualification of counsel). Although the Court did not expressly invoke Section 1254 in exercising its certiorari jurisdiction in these cases, it never suggested that the "exceptional circumstances" standard for issuance of the common-law writ of certiorari had been met.

II. THIS COURT HAS THE POWER TO ISSUE A COMMON-LAW WRIT OF CERTIORARI

Even if the Court concludes that it lacks jurisdiction to issue a statutory writ of certiorari in this case, it still has jurisdiction to issue a common-law writ of certiorari.[19] The power of this Court to issue common-law writs of certiorari is codified in the All Writs Act, 28 U.S.C. § 1651. That statute provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

The Court's power to issue "*all* writs * * * appropriate in aid of [its appellate] jurisdiction" is plenary. See *Ex parte Peru*, 318 U.S. 578, 583-585 (1943) ("the common law writs * * * may be granted or withheld in the sound discretion of the Court"); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) ("[T]he question * * * is not whether [a court has] power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power."); Richard F. Wolfson, *Extraordinary Writs in the Supreme Court Since* Ex Parte Peru, 51 COLUM. L. REV. 977, 981 (1951) ("[I]ssuance of extraordinary writs depends not upon power but solely upon considerations of discretion."). This Court is "slow to reach a conclusion which would deprive [it]

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[19] The Court may grant a common-law writ of certiorari even though the petition for certiorari did not invoke Section 1651. The Court has routinely granted writs of certiorari to review denials of leave to appeal notwithstanding the petitioner's failure to invoke jurisdiction under the All Writs Act. See cases cited note 12, *supra*. In any event, defective allegations of jurisdiction may be amended in appellate courts, including in this Court. See 28 U.S.C. § 1653; *Norton* v. *Larney*, 266 U.S. 511, 516 (1925) ("the power of this court, in its discretion, to allow such amendments [] and its duty to do so in appropriate cases, cannot be doubted"). Petitioner respectfully requests leave to amend the allegation of jurisdiction contained in his petition should the Court deem it necessary.

of the power to issue the writ in proper cases to review the action of the Federal courts inferior to the jurisdiction of this court." *McClellan* v. *Carland*, 217 U.S. 268, 279 (1910).

This Court repeatedly has held that this broad common-law power includes the authority to review decisions denying certificates of probable cause or otherwise preventing litigants from obtaining review of their claims in the courts of appeals. See Note, *Federal Court Review By Extraordinary Writ: A Clogged Safety Valve in the Final Judgment Rule*, 63 YALE L.J. 105, 108 (1953) (observing that the Court has often "utilized common law certiorari to examine thwarted attempts to reach the courts of appeals"). In *House* v. *Mayo*, this Court squarely held that the All Writs Act grants it certiorari power to "review the action of the court of appeals in declining to allow an appeal to it" for lack of a certificate of probable cause. 324 U.S. at 44 (citing *Steffler* v. *United States*, 319 U.S. 38, 39 (1943); *Holiday* v. *Johnston*, 313 U.S. 342, 348 n.2 (1941); and *In re 620 Church St. Bldg. Corp.*, 299 U.S. 24, 26 (1936)). The Court held that the common-law certiorari power "extends also to questions on the merits sought to be raised by the appeal" that the court of appeals had improperly rebuffed. 324 U.S. at 44-45.

Issuance of a common-law writ to review a denial of leave to appeal is consistent with the language of Section 1651(a) and the historic function of the writ. It is quintessentially "necessary" *and* "appropriate in aid of" this Court's appellate jurisdiction (28 U.S.C. § 1651) because it prevents a lower court from terminating a case that this Court otherwise would eventually have the power to review. In these circumstances, employment of the writ to review a lower court's denial of leave to appeal is fully consistent with the writ's traditional role as a tool for policing the exercise of jurisdiction by lower courts. "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction *or to compel it to exercise its authority when it is its*

duty to do so." *Roche*, 319 U.S. at 26 (emphasis added). See *Ex parte Peru*, 318 U.S. at 583. In the absence of such authority, inferior courts could insulate their decisions from any review simply by dismissing, or denying leave to proceed for, appeals toward which they were disinclined. See *McClellan*, 217 U.S. at 280; *Roche*, 319 U.S. at 25.[20]

Although this Court's *power* to issue common-law writs in aid of its appellate jurisdiction is plenary, it generally exercises its *discretion* to issue them only when exceptional circumstances so warrant. See *Ex parte Peru*, 318 U.S. at 584; Supreme Court Rule 20.1; Wolfson, *supra*, at 981. But the Court has repeatedly found such exceptional circumstances to exist where, as here, a lower court has erroneously barred an appeal by an unsuccessful habeas petitioner, who might have made a substantial showing of the denial of a constitutional right. See, *e.g.*, *House* v. *Mayo*, *supra*; *Rogers* v. *Teets*, 350 U.S. 809 (1955); *Burwell* v. *Teets*, 350 U.S. 808 (1955).

In *Davis* v. *Jacobs*, 454 U.S. 912 (1981), the dissent suggested that alternative forms of relief are available to petitioners who are wrongfully denied a statutorily authorized and meritorious appeal from denial of a habeas petition.[21]

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[20] Issuance of the writ is "in aid of" the Court's appellate jurisdiction even though no appeal is yet pending in the courts of appeals. See, *e.g.*, *Ex parte Kawato*, 317 U.S. 69 (1942); *Ex parte United States*, 287 U.S. 241 (1932); *Ex parte Peru*, 318 U.S. 578 (1943); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. at 25. See generally Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153.

[21] Dissenting from the denial of certiorari in a series of habeas cases, then-Justice Rehnquist argued in *Davis* v. *Jacobs* that Section 2253 bars any certiorari review of the decisions of circuit courts disallowing appeals and that the petitions therefore must be dismissed. 454 U.S. 912, 915-919 (1981). He reasoned that a rule against certiorari review would not "result in meritorious petitions for habeas corpus slipping by unobservant or callous Courts of Appeals, thereby evading any review by this Court"

(continued...)

Although alternate forms of relief for individual petitioners remain available (see *Felker* v. *Turpin*, 116 S. Ct. 2333, 2338, 2341-2342 (1996)), none is an adequate means of "aid[ing]" this Court's appellate jurisdiction. Those alternate forms of individual relief are ineffectual tools for this Court to perform its appellate responsibilities: they do not permit the Court to engage in direct review to reconcile intercircuit conflicts or to ensure uniformity of federal law. Cf. *Forsyth*, 166 U.S. at 512 (emphasizing the importance of statutory certiorari review to prevent conflict and confusion among the circuits). An individual Justice's issuance of an original certificate of appealability may do justice in an individual case, but it is not binding precedent on a circuit (like the Eighth Circuit) that has adopted an errant rule of law regarding the standards for certificate issuance.

There are also certain errors in interpretation of Section 2253 that may be difficult or impossible for the Court to reach except through issuance of a writ of certiorari. For example, questions regarding what procedures must be followed before the courts of appeals' certificate decisions — *e.g.*, whether an applicant must be given any opportunity to file a motion or brief in support of his request for a certificate — may be unreviewable except on certiorari. A court of appeals might construe a notice of appeal as an application for a certificate and summarily deny it before the would-be appellant has any opportunity to submit an application or other paper in support of a certificate. Although the would-be appellant could file an original application for a certificate in this Court, any challenge to the summary procedure by which his application had been disposed of in the court below would be unreviewable in that proceeding: the only issue before this Court would be whether a certificate should issue. Thus, any split in the circuits

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[21] (...continued)
because "a Circuit Justice, or this Court itself, may issue a certificate of probable cause." *Id.* at 918.

regarding the procedures required for certificate decisions might go unresolved in the absence of certiorari review.[22]

Even if Section 1254(1) did not confer on this Court statutory jurisdiction to review denials of certificates, that would not mean that the Court also lacks jurisdiction to review denials of certificates under the All Writs Act. *Compare Davis*, 454 U.S. at 917 (Rehnquist, J., dissenting) (arguing that "where Congress has withheld appellate review, the All Writs Act cannot be used as a substitute for an authorized appeal"). This Court has consistently held that the purpose of Section 1651 is precisely *to supplement* other, more limited statutory grants of jurisdiction such as Section 1254. In *In re 620 Church St.*, for example, the Court explained that "the All Writs Act contemplates the employment of this writ in instances not covered by [statutory certiorari] and affords ample authority for using the writ as an auxiliary process and as a means 'of giving full force and effect to existing appellate authority and of furthering justice in other kindred ways.'" 299 U.S. at 26 (internal quotation marks omitted). Accord *Ex parte Peru*, 318 U.S. at 585 n.4; *United States* v. *Beatty*, 232 U.S. 463, 467 (1914). That its traditional use has been to supplement this Court's jurisdiction in cases the statutory certiorari power could not reach cannot reasonably be disputed. As one commentator has correctly observed, "[t]he modern significance of the common-law writ of certiorari has been that of reviewing interlocutory rulings and of reviewing courts of appeals' decisions in cases that for one reason or another were not 'in' a court of appeals so as to be reviewable by the statutory writ." Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*,

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[22] *Compare* Fourth Circuit Rule 34(b) (directing clerk to notify pro se appellants that they should file a brief in support of their application) *with* J.A. 4, 41-42 (decision of Eighth Circuit construing notice of appeal as certificate request and denying "request" without providing petitioner prior opportunity to present argument).

1962 SUP. CT. REV. 153, 186. Accord ROBERTSON & KIRKHAM, *supra*, § 309, at 583-584.

Nor does Section 2253 evince a "legislative purpose to foreclose review" of denials of certificates. *Davis*, 454 U.S. at 917 (Rehnquist, J., dissenting). As we show in Section IV below, Section 2253 instead confirms Congress's intent that the Court retain its well-established and frequently exercised certiorari power to review such cases.

III. IT HAS BEEN THIS COURT'S CONSISTENT PRACTICE OVER THE PAST HALF-CENTURY TO ISSUE WRITS OF CERTIORARI TO REVIEW DECISIONS BY THE COURTS OF APPEALS DENYING LEAVE TO APPEAL

As previously explained, this Court decided in *House* v. *Mayo* in 1945 that it has the power under the All Writs Act, 28 U.S.C. § 1651, to grant a writ of certiorari to "review the action of the court of appeals in declining to allow an appeal to it" for lack of a certificate of probable cause. 324 U.S. at 44. Since the decision in *House*, the Court has repeatedly granted writs of certiorari to reverse,[23] to vacate,[24] and even to affirm[25]

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[23] See, *e.g.*, *Lynce* v. *Mathis*, 117 S. Ct. 891 (1997); *Lozada* v. *Deeds*, 498 U.S. 430 (1991); *Smith* v. *Digmon*, 434 U.S. 332 (1978); *Humphrey* v. *Cady*, 405 U.S. 504 (1972); *Walker* v. *Wainwright*, 390 U.S. 335 (1968); *Maxwell* v. *Bishop*, 385 U.S. 650 (1967); *Phelper* v. *Decker*, 385 U.S. 18 (1966); *Jennings* v. *Ragen*, 358 U.S. 276 (1959); *Rogers* v. *Teets*, 350 U.S. 809 (1955); *Burwell* v. *Teets*, 350 U.S. 808 (1955). See also *McCarthy* v. *Harper*, 449 U.S. 1309, 1310 (1981) (Rehnquist, J., in chambers) (predicting, in a case in which the court of appeals had decided the merits of an appeal notwithstanding the appellant's failure to obtain the requisite certificate of probable cause, that "this Court would grant applicant's petition for certiorari, and * * * reverse the judgment of the Court of Appeals with instructions to dismiss [the] appeal").

[24] See, *e.g.*, *Bridge* v. *Collins*, 494 U.S. 1013 (1990) (memorandum decision); *Selvage* v. *Collins*, 494 U.S. 108 (1990); *Graham* v. *Lynaugh*, (continued...)

decisions of the courts of appeals denying certificates of probable cause.

Indeed, the Court not infrequently has provided precisely the relief it is questioning its jurisdiction to give in this case — granting a writ of certiorari, vacating a court of appeals decision denying a certificate of probable cause, and remanding to that court for reconsideration in light of subsequent developments. See, *e.g.*, *Fretwell* v. *Norris*, 117 S. Ct. 2504 (1997); *Graham* v. *Collins*, 506 U.S. 461, 465 (1993). The Court also has, on at least one occasion, treated a petition for habeas corpus as a petition for certiorari in order to vacate an erroneous decision, reflecting a view that review on certiorari is the appropriate remedy for a court of appeals' improper denial of a certificate. See *In re Shuttlesworth*, 369 U.S. 35 (1962). The Court has similarly issued writs to review decisions of the courts of appeals denying leave to appeal in forma pauperis.[26]

Several of these cases have resulted in significant opinions resolving conflicts among the circuits on important issues of law. In *Lynce* v. *Mathis*, 117 S. Ct. 891 (1997), for example, the Court granted certiorari to resolve a circuit conflict about whether a Florida statute that retroactively canceled provisional release credits violated the Ex Post Facto Clause. After resolving the legal issue, the Court reversed the court of appeals' decision denying a certificate of probable cause.

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[24] (...continued)
492 U.S. 915 (1989); *In re Shuttlesworth*, 369 U.S. 35 (1962).

[25] See, *e.g.*, *Allen* v. *Hardy*, 478 U.S. 255 (1986).

[26] See, *e.g.*, *Carafas* v. *LaVallee*, 391 U.S. 234 (1968); *Nowakowski* v. *Maroney*, 386 U.S. 542 (1967); *Ragan* v. *Cox*, 369 U.S. 437 (1962); *Douglas* v. *Green*, 363 U.S. 192 (1960); *Ellis* v. *United States*, 356 U.S. 674 (1958); *Farley* v. *United States*, 354 U.S. 521 (1957); *Johnson* v. *United States*, 352 U.S. 565 (1957); *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948).

The Court's consistent practice of issuing writs of certiorari to review denials of leave to appeal reflects its historical conviction that it has the power to do so. Accordingly, it is itself strong evidence of the Court's jurisdiction. See, *e.g.*, *Ex parte Peru*, 318 U.S. at 585 (holding that the Court's longstanding "concurrence in the existence of its jurisdiction * * * would be beyond explanation if there had been any thought that [the Court lacked the power] to issue the writs") (citing *Stuart* v. *Laird*, 5 U.S. (1 Cranch) 299 (1803)).

IV. SECTION 2253 DID NOT ABOLISH CERTIORARI JURISDICTION OVER DENIALS OF CERTIFICATES OF APPEALABILITY

In view of the clear evidence that this Court possesses the power to issue both statutory and common-law writs of certiorari to review denials of certificates, and its uninterrupted practice for the last half-century of issuing such writs, it would require the clearest of legislative statements to retract that jurisdiction. In fact, the text, structure, and purpose of Section 2253 show precisely the opposite: Congress affirmatively intended this Court to retain its certiorari jurisdiction to review gatekeeping decisions made under Section 2253.

As this Court has frequently emphasized, interpretation of any statute must begin with the statutory text. *E.g.*, *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1990); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Section 2253(c)(1) provides:

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.

Section 2253 does not mention, let alone purport to abolish, this Court's certiorari jurisdiction over the certificate decisions of courts of appeals judges; indeed, it does not refer to this Court at all. By its express terms, Section 2253 restricts access solely to one proceeding: "*an appeal * * * to the court of appeals from * * * the final order in a [habeas] proceeding.*" 28 U.S.C. § 2253(c)(1) (emphasis added).

Historically, this Court has been reluctant to determine that Congress has revoked the Court's appellate jurisdiction without a clear legislative statement to that effect. As the Court emphasized in analyzing an analogous provision of the AEDPA, "[r]epeals [of appellate jurisdiction] by implication are not favored." *Felker*, 116 S. Ct. at 2338. See also *Ex parte McCardle*, 74 U.S. 506, 515 (1868); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 279-280 (1821). In light of this rule, the dearth of *any* language in Section 2253 that can reasonably be construed to abolish certiorari review of certificate-of-appealability decisions alone is sufficient to establish that Section 2253 does not erect such a prohibition. See, *e.g.*, *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances.").

Elsewhere in the AEDPA, Congress *did* provide a very clear statement of its intent to eliminate certiorari review over *another* gatekeeping decision, demonstrating that it knows how to do so when that is its purpose. The AEDPA requires the courts of appeals to make two different gatekeeping determinations. Section 2253(c) — at issue here — requires courts of appeals to determine whether to issue a certificate as a predicate to an appeal from the denial of a *first* habeas petition. Section 2244(b)(3) requires courts of appeals to determine whether to issue an order as a predicate to a district court's consideration of a *second or successive* habeas petition.

Congress left no doubt that the court of appeals' determination whether to authorize a successive petition pursuant to Section 2244 is not directly reviewable by any court:

> The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable *and shall not be the subject of a petition* for rehearing or *for a writ of certiorari.*

28 U.S.C. § 2244(b)(3)(E) (emphasis added). See *Felker*, 116 S. Ct. at 2338-2339. Tellingly, Section 2253(c) contains no similar prohibition on review by "a petition for rehearing or a writ of certiorari" of a *certificate of appealability* decision. Congress's decision not to include an analogous provision in Section 2253 reflects its affirmative intent to retain certiorari review in this context.

"Nothing, indeed, but a different intent explains the different treatment." *Lindh,* 117 S. Ct. at 2064. As this Court held just last Term, Congress's intent under the AEDPA is apparent when it inserts certain language in only one of two parallel provisions. *Id.* at 2059. In *Lindh*, the Court inferred that Congress did not intend other, analogous sections to be applied retroactively. That logic is equally applicable here.[27]

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[27] Congress made a similarly clear statement prohibiting appellate review by this Court absent a certificate of probable cause in the 1908 statute that preceded Section 2253:

> from a final decision by a court of the United States in a proceeding in *habeas corpus* where the detention complained of is by virtue of process issued out of a state court *no appeal to the Supreme Court shall be allowed* unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance.

Act of March 10, 1908, ch. 76, 35 Stat. 40 (emphasis added). In light of (continued...)

Reading the AEDPA consistently with its plain language — to permit certiorari review of decisions disallowing appeal from denials of first federal habeas petitions but not of decisions disallowing second or successive federal habeas petitions — is entirely sensible. This Court has recognized the critical importance of one full, fair review of a first claim for habeas relief — particularly for federal prisoners, who (unlike state prisoners) have no prior opportunities for collateral review. "Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar* v. *Thomas*, 116 S. Ct. 1293, 1299 (1996). The availability of review by this Court of a decision cutting off a right to appeal from denial of a first petition therefore serves important constitutional values by safeguarding the decision's accuracy and fairness. In contrast, "'second and successive' petitions * * * pose a greater threat to the State's interests in 'finality' and are less likely to lead to the discovery of unconstitutional punishments." *Ibid.* Accordingly, certiorari review of such decisions is less critical to fairness and may frustrate the heightened interest in finality in the successive petition context.

Similarly, Congress provided a less restrictive *standard* for the courts of appeals to apply in deciding whether to issue a certificate of appealability from denial of a first petition, than it provided for deciding whether to permit the filing of a second

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[27] (...continued)
that clear statement in the 1908 Act, this Court found itself without the power to allow direct appeals in cases in which no certificate of probable cause had issued. *E.g.*, *Bilik* v. *Strassheim*, 212 U.S. 551 (1908); *Ex parte Patrick*, 212 U.S. 555 (1908). Congress modified that statute in 1925 to require a certificate as a predicate solely to the court of appeals' jurisdiction, rather than to this Court's. Act of Feb. 13, 1925, ch. 229, § 6(d), 43 Stat. 940.

or successive petition.[28] This difference confirms that Congress intended the two gatekeeping decisions to operate differently, permitting greater access to appeals from first petitions than to successive petitions.

That this Court has consistently exercised its certiorari power to review certificate decisions by the courts of appeals for the last half-century only strengthens the conclusion that Congress's failure to forbid certiorari review of gatekeeping decisions under Section 2253 was intentional. In 1996, when Congress amended the certificate requirement contained in Section 2253, it was legislating against a background of five decades of this Court's decisions reversing courts of appeals' denials of certificates of probable cause. Those decisions implicitly interpreted the prior version of Section 2253 not to preclude such review. Yet in amending Section 2253, Congress chose not to proscribe or even to address the issue of certiorari review.[29] Congress's cognizance of the availability of certiorari review of gatekeeping decisions (reflected in its prohibition against such review in Section 2244) and its acquiescence in this Court's persistent exercise of that power strongly indicate its endorsement of the continued availability of certiorari review. See *Monessen Southwestern Ry.* v. *Morgan*, 486 U.S. 330, 338 (1988); *Francis* v. *Southern Pac. Co.*, 333 U.S. 445, 449 (1948).

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[28] *Compare* 28 U.S.C. § 2253(c)(2) (requiring only that the would-be appellant make "a substantial showing of the denial of a constitutional right") with *id.* § 2244(b)(2) (requiring, among other things, that the second or successive petitioner show "that the claim relies on a *new rule* of constitutional law, *made retroactive* to cases on collateral review by the Supreme Court that *was previously unavailable*") (emphasis added).

[29] Congress's failure to reverse this Court's assertion of certiorari power legislatively is even more striking in light of the fact that several Justices had, in two published dissents, argued that Section 2253 should be interpreted to deprive the Court of its certiorari power. See *Davis* v. *Jacobs*, 454 U.S. 912 (1981); *Jeffries* v. *Barksdale*, 453 U.S. 914 (1981).

Interpretation of Section 2253 to allow certiorari review would not undermine the purpose of that provision to reduce the burden on this Court and the States imposed by frivolous habeas appeals. *Compare* 454 U.S. at 917-918 (Rehnquist, J., dissenting). To the contrary, interpretation of Section 2253 to *forbid* certiorari review would only unleash a torrent of original applications for certificates of appealability and petitions for habeas corpus in this Court. Because, in the absence of certiorari review of decisions on the appealability of first petitions, some circuits will apply erroneous standards in rejecting certificates of appealability (see page 30, *supra*), many of those applications may be meritorious. Nor would interpretation of Section 2253 to permit certiorari review burden the "States [with] the necessity of responding to the volume of frivolous appeals." *Davis*, 454 U.S. at 917-918 (Rehnquist, J., dissenting). This Court's Rules expressly authorize respondents to refrain from filing an opposition to a petition for certiorari, "except in a capital case * * * or when ordered by the Court." Sup. Ct. Rule 15.1. States routinely avail themselves of this option when a petition is frivolous. See ROBERT L. STERN, EUGENE GRESSMAN, et al., SUPREME COURT PRACTICE 375 (7th ed. 1993).

Finally, any effort to insert into Section 2253 a prohibition of certiorari review would run afoul of the principle that statutes should be construed to avoid constitutional difficulties whenever possible. See *Rust* v. *Sullivan*, 500 U.S. 173, 190 (1991); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500 (1979). Interpretation of Section 2253 to foreclose any review of refusals to allow meritorious appeals from the denial of habeas relief would raise questions about the Act's constitutionality under the Exceptions Clause of the Constitution. See *Felker*, 116 S. Ct. at 2342 & n.2 (Souter, Stevens & Breyer, JJ., concurring) (noting that, if the AEDPA were interpreted to foreclose review of gatekeeping decisions under the All Writs Act, a serious "question whether the statute exceeded Congress's Exceptions Clause power would be open" and observing that "[t]he question

could arise if the Courts of Appeals adopted divergent interpretations of the gatekeeping standard").[30] This Court adopted the rule that Congress must provide a clear statement of its intent to deprive courts of jurisdiction in part to avoid these difficult constitutional questions. See, *e.g.*, *Webster* v. *Doe*, 486 U.S. 592, 603 (1988); *Johnson* v. *Robison*, 415 U.S. 361, 366-367 (1974).

In sum, precedent, history and legislative design leave no room for doubt: the Court has jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Solicitor General.

V. THIS COURT HAS CERTIORARI JURISDICTION BECAUSE THE AEDPA DOES NOT APPLY RETROACTIVELY TO THIS CASE

Even if this Court were to conclude that, as a general matter, it lacks certiorari jurisdiction to review cases in which the petitioner has been denied a certificate of appealability by the court of appeals, the Court could still grant certiorari, vacate, and remand in this case. This Court's recent decision in *Lindh* confirms that the AEDPA's certificate-of-appealability requirement does not apply retroactively to Section 2255 movants who, like Arnold Hohn, filed their motion in the district court before the AEDPA was enacted. Thus, petitioner was entitled to an appeal as of right to the Eighth Circuit under

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[30] See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (Congress may not under the Exceptions Clause "destroy the essential role of the Supreme Court in the constitutional plan"); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960) (providing "a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts" is an essential function of the Court).

28 U.S.C. § 2253 (1995). Accordingly, no bar exists to this Court's certiorari jurisdiction in this case.[31]

In *Lindh*, the Court addressed the question whether the AEDPA should be applied retroactively. The AEDPA made various amendments to Chapter 153 of Title 28 of the United States Code, which governs all habeas corpus proceedings in the federal courts, and created an entirely new Chapter 154, which establishes special rules for habeas proceedings against a State in capital cases. Observing that Section 107(c) of the AEDPA expressly states that "Chapter 154 * * * shall apply to cases pending on or after the date of enactment of this Act" (110 Stat. 1226), but that the statute does not indicate whether Chapter 153 should be applied retroactively, the Court concluded that "[t]he statute reveals Congress's intent to apply the amendments to chapter 153 only to such cases as were filed after the statute's enactment." *Lindh*, 117 S. Ct. at 2063. By negative implication, the Court reasoned, Congress intended for the amendments contained in Chapter 153 to apply only to cases filed after the AEDPA had been passed:

> We read this provision of § 107(c), expressly applying Chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments to Chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act.

The AEDPA's new certificate-of-appealability requirement for federal prisoners was an amendment to Chapter 153. Because *Lindh* held that "the new provisions of Chapter 153 gen-

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[31] Recent precedent confirms this point. In *Fretwell* v. *Norris*, 117 S. Ct. 2504 (1997), the Court granted certiorari in a case in which the court of appeals had denied a certificate of appealability to a petitioner who had filed his habeas petition prior to the Act's effective date, but had filed his appeal after that date. The Court vacated and remanded in light of *Lindh*.

erally apply only to cases filed after the Act became effective" (*id.* at 2068), it is now clear that the certificate requirement applies only to Section 2255 motions filed after the effective date of the AEDPA. Hohn filed his Section 2255 motion three months before the AEDPA was enacted, and it consequently is not subject to the certificate requirement. Under pre-AEDPA law, Hohn is entitled to an appeal to the Eighth Circuit as a matter of right. See 28 U.S.C. § 2253 (1995); see also *United States* v. *Perez*, 129 F.3d 255, 259 (2d Cir. 1997) ("Before the AEDPA, a defendant was not required to make any threshold showing to appeal the denial of his § 2255 motion.").

The overwhelming majority of federal courts have concluded that, under the *Lindh* analysis, Section 2255 movants who filed their motions before the AEDPA became law but who filed a notice of appeal after the date of enactment are not subject to the certificate-of-appealability requirement. See *United States* v. *Perez*, 129 F.3d at 260 ("[t]he most reasonable conclusion to be drawn from *Lindh* is that an appellant need not obtain a COA to appeal the denial of his § 2255 motion so long as he filed the motion before April 24, 1996"); *United States* v. *Kunzman*, 125 F.3d 1363, 1364 n.2 (10th Cir. 1997); *United States* v. *Skandier*, 125 F.3d 178 (3d Cir. 1997); *Koo* v. *McBride*, 124 F.3d 869, 872 & n.3 (7th Cir. 1997); *Hardwick* v. *Singletary*, 122 F.3d 935 (11th Cir. 1997); *Arredondo* v. *United States*, 120 F.3d 639 (6th Cir. 1997); *United States* v. *Carter*, 117 F.3d 262, 264 (5th Cir. 1997).

Standing against this array of circuits are the Eighth Circuit and the Solicitor General. In his brief responding to our petition for certiorari, the Solicitor General attempted to distinguish *Lindh* by arguing that Hohn's "case" was not filed before the enactment of the AEDPA because Hohn's "case" in the court of appeals was entirely different from his "case" in the district court. U.S. Resp. 11. He maintained that, because Hohn filed his "case" in the court of appeals after the AEDPA was enacted, Hohn was subject to the certificate-of-appealability requirement. *Ibid.* The only court of appeals to have addressed

the government's argument has categorically rejected it. See *United States* v. *Skandier*, 125 F.3d 178, 182 (3d Cir. 1997). And the only court of appeals to accept the government's view of the statute's retroactivity — the Eighth Circuit in *Tiedeman* v. *Benson*, 122 F.3d 518 (1997) — did so not because the appellate phase constitutes a different "case" but because it could "think of no reason why a new provision exclusively directed towards appeal procedures would depend for its effective date on the filing of a case in a trial court." *Id.* at 521.[32]

But the *Tiedeman* panel erroneously dismissed the dispositive "reason": this Court's decision in *Lindh*. *Lindh* did not expressly address the retroactivity of Section 2253; but its rationale is nonetheless dispositive of that issue. In explaining that it granted certiorari in light of the split between circuits over whether the new Section 2254(d) provisions should apply to pending cases, the *Lindh* Court cited (in addition to several cases involving Section 2254(d)) *Hunter* v. *United States*, 101 F.3d 1565 (11th Cir. 1996) (en banc). See *Lindh*, 117 S. Ct. at 2062. *Hunter* held that the certificate-of-appealability requirement applies to cases filed in the district court before the AEDPA became law. *Hunter*, 101 F.3d at 1573. As the Second Circuit has noted, "[t]he Court's reference to *Hunter* strongly indicates that it intended to address the retroactivity of *all* the new chapter 153 provisions enacted by the AEDPA." *Perez*, 129 F.3d at 260 (emphasis added). Indeed, the Eleventh Circuit

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[32] If the Court determines that it lacks jurisdiction over decisions of the courts of appeals denying certificates of appealability because those cases are not "in" the court of appeals under 28 U.S.C. § 1254(1), it will necessarily have rejected the central premise of the government's argument concerning *Lindh*. The government's argument is predicated on the notion that Hohn's "case" in the court of appeals was a different "case" from the one in the trial court, and that the critical date is when Hohn's "case" in the court of appeals was filed. But if the Court lacks jurisdiction over the Eighth Circuit's decision below because there was no "case[] in the court[] of appeals," that basis for distinguishing *Lindh* would fall too.

subsequently determined that its en banc decision in *Hunter* had been overruled by the decision in *Lindh*. See *Hardwick* v. *Singletary*, 122 F.3d 935, 936 (11th Cir. 1997). As these courts recognize, *Lindh* compels the conclusion that the certificate-of-appealability requirement does not apply to Section 2255 motions — like Hohn's — that were pending in the district court at the time of the AEDPA's enactment.

That application of *Lindh* is sensible from a judicial administration perspective. A rule that all the new amendments to Chapter 153 apply prospectively to cases filed in the district court after the effective date of the AEDPA promotes uniformity and will reduce litigation. Absent such a rule, there will be a period of prolonged uncertainty while the question whether each particular provision of Chapter 153 of the AEDPA is retroactive will be disputed.

Under *Lindh*, the certificate-of-appealability requirement does not apply to Hohn's appeal. The Eighth Circuit erred when it applied the AEDPA retroactively to this case, and no provision in the AEDPA can prevent this Court from issuing a writ of certiorari to review the Eighth Circuit's decision.[33]

VI. THIS COURT, OR ANY OF ITS MEMBERS, SHOULD GRANT A CERTIFICATE OF APPEALABILITY

If the Court determines that it lacks the power to review the court of appeals' decision, petitioner respectfully requests that the Court or any individual Justice issue him a certificate of appealability so that he may obtain the relief to which he is

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[33] If the Court assumes jurisdiction after concluding that the certificate-of-appealability requirement does not apply retroactively to this case, that would moot the government's confession of error (which pertains only to the proper application of the standard in Section 2253). In that event, the Court should remand with instructions to the Eighth Circuit to consider Hohn's appeal as of right on the merits.

entitled — the right to have his meritorious appeal of the denial of Section 2255 relief heard by the court of appeals.[34]

Congress plainly has authorized this Court or any individual Justice to issue Hohn a certificate of appealability. The AEDPA expressly grants that power to "a circuit justice." 28 U.S.C. § 2253(c)(1). On numerous occasions, this Court has acted on applications for certificates of probable cause.[35] Similarly, the power of any individual Justice to grant a certificate cannot seriously be disputed.[36]

Under the AEDPA, petitioner is entitled to a certificate of appealability if he can make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That standard is met when the issues are "debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are *adequate to deserve encouragement to proceed further*." *Lozada* v. *Deeds*, 498 U.S. 430, 432 (1991) (quoting *Barefoot* v. *Estelle*, 463 U.S. 880, 893 n.4 (1983)) (internal quotation marks omitted) (emphasis added). The issues

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[34] Petitioner is filing a separate application for a certificate of appealability pursuant to Supreme Court Rule 22. That application presents the same arguments made in this Section.

[35] *E.g.*, *Derrick* v. *Collins*, 497 U.S. 1042 (1990); *O'Rear* v. *Attorney General*, 484 U.S. 1078 (1988); *In re Hunt*, 348 U.S. 968 (1955).

[36] *E.g.*, *Autry* v. *Estelle*, 464 U.S. 1301 (1983) (White, J., in chambers) (granting certificate); *Rosoto* v. *Warden*, 83 S. Ct. 1788 (1963) (Harlan, J., in chambers). See also *Davis* v. *Jacobs*, 454 U.S. at 913-914 (opinion of Stevens, J., respecting the denial of certiorari) ("Because we have that authority, it is part of our responsibility in processing these petitions to determine whether they have arguable merit notwithstanding the failure of a district or circuit judge to authorize an appeal to the Court of Appeals."); *id.* at 918 (dissenting opinion of Rehnquist, J.) (arguing that removing the Court's jurisdiction to review denials of certificates "in no way bars consideration of the merits of a petition which any Member of this Court believes to be deserving of a certificate of probable cause").

in this case are clearly "debatable among jurists of reason," as Judge McMillian's dissent explains. J.A. 42-48.[37]

Hohn is currently in federal custody for conduct that this Court unanimously determined in *Bailey* v. *United States*, 116 S. Ct. 501 (1995), was not criminal. This situation violates the Constitution in at least two ways. It violates the Fifth and Sixth Amendments because the jury instructions at Hohn's trial did not require the jury to make findings on every essential element of the Section 924(c) offense. See *United States* v. *Gaudin*, 515 U.S. 506, 522-523 (1995). And it violates the Due Process Clause because the evidence admitted at Hohn's trial was insufficient to support a conviction under Section 924(c)(1). See *Jackson* v. *Virginia*, 443 U.S. 307, 313-316 (1979). Hohn has made a substantial showing that his constitutional rights have been denied in both of these respects.

This Court has recently reaffirmed that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Gaudin*, 515 U.S. at 522-523. The instructions on the Section 924(c) count at Hohn's trial grossly misstated the law, and Hohn was accordingly deprived of his constitutional right to have a jury determine his guilt beyond a reasonable doubt of every element of that crime. The jury was charged that

> [t]he phrase "used a firearm" means *having a firearm available* to aid in the commission of possession of Methamphetamine with intent to distribute. Similarly, the

[37] The Solicitor General has all but admitted that petitioner is entitled to a certificate of appealability. He has conceded that the jury instruction at Hohn's trial was erroneous in light of this Court's subsequent decision in *Bailey* and that the claims raised in Hohn's Section 2255 motion are of constitutional dimension. And, although the Solicitor General argued that the Eighth Circuit should be provided the first opportunity to determine whether Hohn's claims are "substantial" under Section 2253(c)(2), he failed even to assert that Hohn's claims are not substantial.

> phrase "carried a firearm" *does not require proof of actual possession* of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was *available to provide protection* in connection with the possession of Methamphetamine with intent to distribute or facilitate success.

J.A. 10 (emphasis added). This instruction clearly allowed the jury to convict Hohn of "using a firearm" under a definition of that crime that is manifestly erroneous in light of *Bailey*.

The jury instructions' definition of "carrying a firearm" is similarly erroneous because it essentially repeats the invalid "use" instruction and authorizes a conviction where the firearm is merely "available" for use — a theory rejected as excessively broad in *Bailey*. In any event, Hohn's constitutional rights would be violated *even if the "carrying" instruction were entirely proper*. Because the instructions at Hohn's trial misstated the law with respect to use, it is impossible to negate the possibility that the jury rested Hohn's conviction on a *legally* erroneous ground. Under *Griffin* v. *United States*, 502 U.S. 46 (1991), such a verdict cannot stand. See *id.* at 59 ("When * * * jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error."); see also *United States* v. *Ryan*, 41 F.3d 361, 365 (8th Cir. 1994) (en banc). Thus, under established law it must be presumed that Hohn is currently incarcerated for "using a firearm" even though no jury has ever found beyond a reasonable doubt that his conduct violated 18 U.S.C. § 924(c), as construed by this Court in *Bailey*.

Because the jury instruction on the Section 924(c) count were legally erroneous, Hohn's Fifth and Sixth Amendment rights have indisputably been violated. The Solicitor General has failed to suggest how petitioner's constitutional challenge to the jury instructions, which he has conceded contravened *Bailey*, could be anything other than "substantial." Issuance of a certificate of appealability therefore is clearly warranted.

Moreover, there is a second, independent ground for Hohn's constitutional challenge to his continued incarceration: the evidence presented at his trial was insufficient to support a conviction under Section 924(c)(1). That shortcoming gives rise to a claim under the Due Process Clause which, if valid, entitles Hohn not just to a new trial, but to a judgment of acquittal. It is clear in light of *Bailey* that no evidence was admitted at Hohn's trial that could support a conviction under the "use" prong of Section 924(c). The government has argued, however, that Hohn's constitutional claim would not be substantial unless the evidence similarly could not support a conviction under Section 924(c)'s "carry" prong.

Contrary to the government's contention, the evidence at Hohn's trial was woefully insufficient to show beyond a reasonable doubt that Hohn violated Section 924(c) by "carrying" a firearm "during" the predicate offense. Although this Court recently granted certiorari to resolve a conflict in the courts of appeals over the precise contours of the "carry" prong of Section 924(c) (*Muscarello* v. *United States*, No. 96-1654; *Cleveland* v. *United States*, No. 96-8837, 1997 WL 195307 (Dec. 12, 1997)), it did so in vehicular cases where the defendants were moving in tandem with the firearms. Even if immediate accessibility of the firearm is sufficient in that context, it is not sufficient in a case such as this, where there was *no* evidence (only speculation) that the defendant ever bore the firearm on his person or otherwise moved in tandem with it *during* the predicate drug offense. Indeed, we are aware of *no* post-*Bailey* decision of *any* court of appeals under which the facts of *this* case would support a conviction for "carrying" a firearm under Section 924(c).

Any doubt about the outcome in the Eighth Circuit, moreover, has been erased by that court's recent decision in *United States* v. *McKinney*, 120 F.3d 132 (8th Cir. 1997), on remand from 117 S. Ct. 1544 (1997). In *McKinney*, the defendant had been convicted under Section 924(c) based on the mere presence of guns in the location in which he had sold drugs.

The Eighth Circuit concluded that those facts did not support a conviction under Section 924(c) either for "using" or for "carrying" a firearm. Further, it held that it was *plain error* for the trial court even to submit the case to the jury on the "carrying" theory, because "[h]aving a gun available for use, even an immediate use, is simply not the equivalent of carrying it." *Id.* at 134; see also *id.* at 133 ("In all of the cases in which we have upheld convictions for carrying guns during or in relation to a drug-trafficking offense, the defendant has had the weapon either in a car's hatchback, in the passenger compartment of a car, or on his person, and was thus carrying the offending weapons in an obvious, literal way."). If it was plain error for the district court to submit a "carrying" charge to the jury in *McKinney*, the same is true *a fortiori* in this case.

Thus, because Hohn has easily made a "substantial showing" with respect to his Due Process Clause claim concerning the insufficiency of the evidence that he "carried" a firearm, he is entitled to a certificate of appealability under the standard in Section 2253(c)(2). He therefore respectfully asks the Court or any individual Justice to issue him a certificate of appealability to enable him to take his meritorious appeal of the denial of his Section 2255 motion.

CONCLUSION

This Court should vacate the decision below and remand per the suggestion of the Solicitor General. In the alternative, the Court should either vacate and remand with instructions to consider Hohn's appeal, or grant Hohn a certificate of appealability.

Respectfully submitted.

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APPENDIX

18 U.S.C. § 924. Penalties.

* * *

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

* * *

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

* * *

28 U.S.C. § 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

* * *

28 U.S.C. § 2244. Finality of determination.

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

* * *

28 U.S.C.§ 2253. Appeal.

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(9)

DEC 23 1997

No. 96-8986

In the Supreme Court of the United States

OCTOBER TERM, 1997

ARNOLD F. HOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

This Court granted certiorari limited to the following question:

In light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Solicitor General?

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory provisions and rules involved	2
Statement	2
Summary of argument	7
Argument:	
This Court has jurisdiction to review by common-law writ of certiorari the order of the court of appeals denying petitioner's application for a certificate of appealability	9
A. The Court's precedent firmly establishes certiorari jurisdiction to review the denial of a certificate of appealability, and that jurisdiction was not revoked by the AEDPA	10
B. The Court's precedent supports certiorari jurisdiction under the All Writs Act	15
C. All Writs Act principles justify the use of common-law certiorari to review denials of certificates of appealability in appropriate cases	26
1. If review of the order of the court of appeals is unavailable under Section 1254(1), resort to a common-law writ of certiorari is "necessary" "in aid of" this Court's appellate jurisdiction	27
2. Use of a common-law writ of certiorari is "agreeable to the usages and principles of law"	34
Conclusion	40
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Abdu, Ex parte, 247 U.S. 27 (1918) 28
Adams v. *United States ex rel. McCann*, 317 U.S. 269 (1942) 32
Adkins v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948) 23
Allen v. *Hardy*, 478 U.S. 255 (1986) 11, 25, 30
Allied Chem. Corp. v. *Daiflon, Inc.*, 449 U.S. 33 (1980) 29
Anderson v. *Collins*, 495 U.S. 943 (1990) 31
Autry v. *Estelle*, 464 U.S. 1301 (1983) 31
Bailey v. *United States*, 516 U.S. 137 (1995) 2, 3
Bankers Life & Casualty Co. v. *Holland*, 346 U.S. 379 (1953) 29
Barefoot v. *Estelle*, 463 U.S. 880 (1983) 31, 39
Bradstreet, Ex parte, 32 U.S. (7 Pet.) 634 (1833) ... 35
Burwell v. *Teets*, 350 U.S. 808 (1955) 11, 17, 24
Burwell, In re, 350 U.S. 521 (1956) 8, 12, 16, 17, 26, 31
Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 14
Carafas v. *Lavallee*:
389 U.S. 896 (1967) 24
391 U.S. 234 (1968) 24
Cash v. *United States*, 357 U.S. 219 (1958) 24
Chetwood, In re, 165 U.S. 443 (1897) 34, 35, 36
Conway v. *California Adult Auth.*, 393 U.S. 1062, cert. dismissed, 396 U.S. 107 (1969) 11, 24
Coppedge v. *United States*:
366 U.S. 959 (1961) 24
369 U.S. 438 (1962) 24
Crane, Ex parte, 30 U.S. (5 Pet.) 190 (1831) 27, 35
Davis v. *Jacobs*, 454 U.S. 911 (1981) 9, 23, 31, 39
De Beers Consol. Mines, Ltd. v. *United States*, 325 U.S. 212 (1945) 29, 36, 38

Cases—Continued: Page

Delbridge v. *United States*, 354 U.S. 906 (1957) 24
DiBella v. *United States*, 369 U.S. 121 (1962) 33
Douglas v. *Green*, 363 U.S. 192 (1960) 24, 25
Edwards v. *United States*, 355 U.S. 36 (1957) 24
Ellis v. *United States*, 356 U.S. 674 (1958) 24
Else v. *Johnson*, 104 F.3d 82 (5th Cir. 1997) 13
Far East Conference v. *United States*, 342 U.S. 570 (1952) 36
Farley v. *United States*, 354 U.S. 521 (1957) 24
Farrell, Ex parte, 189 F.2d 540 (1st Cir.), cert. denied, 342 U.S. 839 (1951) 17
Felker v. *Turpin*, 116 S. Ct. 2333 (1996) 15, 27
Ferguson v. *District of Columbia*, 270 U.S. 633 (1926) 21
Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368 (1981) 16
Forsyth v. *City of Hammond*, 166 U.S. 506 (1897) 30
Gardner v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) 16
Gay v. *Ruff*, 292 U.S. 25 (1934) 15
Graham v. *Lynaugh*, 492 U.S. 915 (1989) 11, 25
Hagans v. *Lavine*, 415 U.S. 528 (1974) 26
Hansford v. *United States*, 357 U.S. 578 (1958) ... 24
Head v. *California*, 374 U.S. 509 (1963) 39
Hill v. *United States*, 356 U.S. 704 (1958) 24
Holiday v. *Johnston*, 313 U.S. 342 (1941) 12, 22, 35
Houchin v. *Zavaras*, 107 F.3d 1465 (10th Cir. 1997) 13
House v. *Mayo*, 324 U.S. 42 (1945) 7, 9, 10, 11, 12, 21, 22, 35, 37, 39
Humphrey v. *Cady*:
401 U.S. 973 (1971) 11, 24
405 U.S. 504 (1972) 11, 25
Hunt, In re, 348 U.S. 968 (1955) 31

Cases—Continued: Page

Hunter v. *United States*, 101 F.3d 1565 (11th Cir. 1996), cert. denied, 117 S. Ct. 1695 (1997) 13
Insurance Co. v. *Comstock*, 83 U.S. (16 Wall.) 258 (1873) 35
International Union, United Automobile Workers v. *Scofield*, 382 U.S. 205 (1965) 19
Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) 20
Jeffries v. *Barksdale*, 453 U.S. 914 (1981) 9, 23, 37
Johnson v. *United States*:
352 U.S. 565 (1957) 24
117 S. Ct. 1544 (1997) 4
Kawato, Ex parte, 317 U.S. 69 (1942) 28
Kitchens v. *United States*, 358 U.S. 42 (1958) 24
La Buy v. *Howes Leather Co.*, 352 U.S. 249 (1957) 27, 29, 38
Lara v. *Nelson*, 449 F.2d 323 (9th Cir. 1971) 17
Liberty Mutual Ins. Co. v. *Wetzel*, 424 U.S. 737 (1976) 16
Lindh v. *Murphy*, 117 S. Ct. 2059 (1997) 15
Los Angeles Brush Mfg. Corp. v. *James*, 272 U.S. 701 (1927) 29
Lozada v. *Deeds*, 498 U.S. 430 (1991) 12, 25, 31
Lozada v. *United States*, 107 F.3d 1011 (2d Cir. 1997) 13
Lurk v. *United States*:
365 U.S. 802 (1961) 24
366 U.S. 712 (1961) 24
Lynce v. *Mathis*:
116 S. Ct. 1671 (1996) 12, 25
117 S. Ct. 891 (1997) 12, 31
Lyons v. *Ohio Adult Parole Auth.*, 105 F.3d 1063 (6th Cir.), cert. denied, 117 S. Ct. 1724 (1997) 13
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 28

Cases—Continued: Page

Maxwell v. *Bishop*, 385 U.S. 650 (1967) 11, 23
McAbee v. *United States*, 361 U.S. 537 (1960) 24
McCarthy v. *Harper*, 449 U.S. 1309 (1981) 16
McClellan v. *Carland*, 217 U.S. 268 (1910) 19, 27, 28, 36, 37
McCullough v. *Cosgrave*, 309 U.S. 634 (1940) 29
McKinney v. *United States*, 117 S. Ct. 1816 (1997) 4
Nixon v. *Fitzgerald*, 457 U.S. 731 (1982) 15, 16, 18, 20, 25
North Star Steel Co. v. *Thomas*, 515 U.S. 29 (1995) 14
Nowakowski v. *Maroney*:
384 U.S. 984 (1966) 24
386 U.S. 542 (1967) 24
Ojeda Rios v. *Wigen*, 836 F.2d 196 (2d Cir. 1988) .. 17
O'Rear v. *Attorney General of Wisconsin*, 484 U.S. 1078 (1988) 31
Page v. *United States*, 359 U.S. 116 (1959) 24
Parr v. *United States*, 351 U.S. 513 (1956) 27
Pollard v. *United States*:
350 U.S. 965 (1956) 23
352 U.S. 354 (1957) 23, 25
Price v. *Johnston*, 334 U.S. 266 (1948) 32, 34
Ragan v. *Cox*, 369 U.S. 437 (1962) 24
Republic of Peru, Ex parte, 318 U.S. 578 (1943) 36
Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943) 27, 36
Rogers v. *Teets*, 350 U.S. 809 (1955) 11, 17, 24
Rogers, In re, 350 U.S. 521 (1956) 17
Rosoto v. *Warden*, 83 S. Ct. 1788 (1963) 31-32
Russello v. *United States*, 464 U.S. 16 (1983) 14
Schlagenhauf v. *Holder*, 379 U.S. 104 (1964) 19, 29
Selvage v. *Collins*, 494 U.S. 108 (1990) 12
Selvage v. *Lynaugh*, 493 U.S. 888 (1989) 12, 25

Cases—Continued: Page

Sentner v. *United States*, 348 U.S. 935 (1955) 23
Shuttlesworth, In re, 369 U.S. 35 (1962) 11, 24, 25, 34, 39
Simcox v. *Madigan*, 366 U.S. 765 (1961) 24
Simons, Ex parte, 247 U.S. 231 (1918) 35
620 Church Street Bldg. Corp., In re, 299 U.S. 24 (1936) 22, 30, 36-37, 39
Smith v. *Digmon*, 434 U.S. 332 (1978) 11, 24, 25
Smith v. *United States*:
361 U.S. 13 (1959) 24
361 U.S. 38 (1959) 24
Steffler v. *United States*, 319 U.S. 38 (1943) 22, 23, 24
Thomas v. *Wainwright*, 475 U.S. 1113 (1986) 31
Tiedeman v. *Benson*, 122 F.3d 518 (8th Cir. 1997) 13
U.S. Alkali Export Ass'n v. *United States*, 325 U.S. 196 (1945) 35, 38
United States v. *Asrar*, 116 F.3d 1268 (9th Cir. 1997) 13
United States v. *Beatty*, 232 U.S. 463 (1914) 36
United States v. *Dickinson*, 213 U.S. 92 (1909) 29
United States v. *Eyer*, 113 F.3d 470 (3d Cir. 1997) 13
United States v. *Hayman*, 342 U.S. 205 (1952) 34
United States v. *Liguori*, 438 F.2d 663 (2d Cir. 1971) 6
United States v. *McKinney*:
79 F.3d 105 (8th Cir. 1996), vacated and remanded, 117 S. Ct. 1816 (1997) 4
120 F.3d 132 (8th Cir. 1997) 4
United States v. *Nixon*, 418 U.S. 683 (1974) 16, 18
United States v. *Perez*, 129 F.3d 255 (2d Cir. 1997) 13
United States, Ex parte, 287 U.S. 241 (1932) 28

Cases—Continued: Page

United States ex rel. Jennings v. *Ragen*, 358 U.S. 276 (1959) 11, 24
Walker v. *Wainwright*, 390 U.S. 335 (1968) 11, 24
Wells v. *United States*, 318 U.S. 257 (1943) 22, 30
Whitney v. *Dick*, 202 U.S. 132 (1906) 33, 34, 35, 36
Willis v. *United States*, 362 U.S. 216 (1960) 24

Constitution, statutes and rules:

U.S. Const. Art. III 27
Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 19
Act of Mar. 10, 1908, ch. 76, 35 Stat. 40 10
Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (Judiciary Act of 1925) 36
§ 6(d), 43 Stat. 940 10
§ 13, 43 Stat. 942 10
Act of June 25, 1948, ch. 646, § 1651(a), 62 Stat. 944 32
§ 2253, 62 Stat. 967 10
All Writs Act, 28 U.S.C. 1651 7
28 U.S.C. 1651(a) 8, 9, 15, 19, 26, 2a
Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 .....
§ 102:
110 Stat. 1217, 28 U.S.C. 2253 (Supp. II 1996) .. 14, 16, 17, 37
110 Stat. 1217, 28 U.S.C. 2253(c) (Supp. II 1996) 8, 19, 28, 30, 4a
110 Stat. 1217, 28 U.S.C. 2253(c)(1) (Supp. II 1996) 4, 5, 13, 16, 17, 31, 4a
110 Stat. 1218, 28 U.S.C. 2253(c)(2) (Supp. II 1996) 5, 14, 20, 4a
110 Stat. 1218, 28 U.S.C. 2253(c)(3) (Supp. II 1996) 14, 4a
§ 106, 110 Stat. 1221 14
28 U.S.C. 2244 (Supp. II 1996) 14, 3a
28 U.S.C. 2244(b)(3)(A) (Supp. II 1996) 14, 3a
28 U.S.C. 2244(b)(3)(E) (Supp. II 1996) . 14, 15, 18, 4a

Statutes and rules—Continued: Page

18 U.S.C. 924(c)(1) 2, 3, 33
28 U.S.C. 230 (1940) 24, 1a
28 U.S.C. 347(a) (1940) 11, 1a
28 U.S.C. 377 (1940) 11, 1a
28 U.S.C. 1254(1) ..... *passim*, 2a
28 U.S.C. 1254(3) (1952) 26, 2a
28 U.S.C. 1291 19
28 U.S.C. 2241 ..... 33, 3a
28 U.S.C. 2253 (1952) 17
28 U.S.C. 2253 (1994) 4, 10, 5a
28 U.S.C. 2254 ..... 4, 7, 9
28 U.S.C. 2255 ..... *passim*, 5a
1st Cir. R. 22.1(b) 13
7th Cir. R. 22.1(b) 13
Fed. R. App. P. 22(b) 13, 17, 6a
advisory committee's note (1967 adoption) 17
Fed. R. Civ. P. 73(a) (1952) 25, 7a
Sup. Ct. R.:
Rule 10(a) 29
Rule 19.3 ..... 26, 7a
Rule 20.1 ..... 33, 7a
Rule 20.6 ..... 35, 8a
Rule 31.1 (1979) 22, 24, 8a

Miscellaneous:

H.R. Rep. No. 23, 60th Cong., 1st Sess. (1908) 37
H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947) 32
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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-8986

ARNOLD F. HOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals denying petitioner's application for a certificate of appealability (J.A. 41-48) is reported at 99 F.3d 892.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1996. A petition for rehearing was denied on February 10, 1997. The petition for a writ of certiorari was filed on May 12, 1997, and invoked this Court's jurisdiction under 28 U.S.C. 1254(1). The petition for a writ of certiorari was granted on October 31, 1997, limited to the following question: "In light of the fact that the Court of Appeals denied the peti-

tioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the * * * Solicitor General?" (118 S. Ct. 361). The jurisdiction of this Court rests on either 28 U.S.C. 1254(1) or 28 U.S.C. 1651(a).

STATUTORY PROVISIONS AND RULES INVOLVED

Relevant statutory provisions, Federal Rules and Supreme Court Rules are reproduced at App., *infra*, 1a-8a.

STATEMENT

1. On June 20, 1990, police officers executed a search warrant at petitioner's house. The police recovered approximately 16 grams of methamphetamine, most of which was in a brown case on the kitchen counter. Within arm's reach of the drugs on the kitchen counter, police found three loaded firearms, two of them in holsters. During the search, the police also found a grinder bearing methamphetamine residue, three other firearms, one of which was loaded, and $293 in currency. J.A. 34, 43; Gov't C.A. Br. in Opp. to Pet. for Rehearing 2. Following a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of, *inter alia*, using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). J.A. 27. Petitioner appealed but did not challenge the sufficiency of the evidence to support his conviction under Section 924(c)(1). The court of appeals affirmed. J.A. 12-26.

2. a. On December 6, 1995, this Court held in *Bailey* v. *United States*, 516 U.S. 137, that a conviction for use of a firearm under Section 924(c)(1) requires the government to "show active employment of

the firearm." *Id.* at 144. Active employment includes uses such as "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire" the weapon. *Id.* at 148. By contrast, mere possession of a firearm does not constitute "use." *Id.* at 149.

b. Following the decision in *Bailey*, petitioner filed a pro se motion seeking to vacate his sentence under 28 U.S.C. 2255 on two grounds. First, he contended that the evidence at his trial was insufficient under *Bailey* to support his conviction under Section 924(c)(1). Petitioner contended that his failure to raise the insufficiency claim on direct appeal should be excused because his conduct "was not a crime," and it would therefore be a "fundamental miscarriage of justice" not to review his claim. Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255, at 8. Second, petitioner challenged the jury instructions at his trial for improperly defining the phrase "use a firearm" and argued that correct jury instructions would likely have produced an acquittal. *Id.* at 11. The government responded that petitioner was not entitled to relief because the evidence at trial was sufficient to show that he had "carried" a firearm. Noting that the police found weapons in holsters next to large amounts of methamphetamine on the counter in petitioner's kitchen, the government argued that the jury could infer that petitioner had "entered his residence and placed his belongings, which included the methamphetamine and firearms, onto the counter." J.A. 34-35. The government acknowledged that, under *Bailey*, the jury instructions at petitioner's trial erroneously defined the word "use," but contended that the error was harmless because "[t]he evidence obviously establishes 'carry-

ing.'" J.A. 35. The district court held that petitioner had "waived" his *Bailey* claim by failing to raise it on direct appeal. J.A. 37-38.[1]

3. a. On April 24, 1996, while petitioner's Section 2255 motion was pending in the district court, the President signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Title I of the AEDPA made changes to the law governing collateral attacks for federal prisoners making Section 2255 motions and state prisoners seeking habeas corpus relief under 28 U.S.C. 2254. Before the passage of the Act, a state prisoner was required to secure a certificate of probable cause authorizing an appeal from the district court's denial of his habeas petition, but no similar requirement was imposed on a federal prisoner seeking to appeal the denial of his Section 2255 motion. See 28 U.S.C. 2253 (1994). Section 102 of the AEDPA amended Section 2253 to require both federal and state prisoners to obtain a "certificate of appealability" as a condition of appealing. The new provision states that, "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * (A) the final

[1] The court relied on *United States* v. *McKinney*, 79 F.3d 105, 109 (1996), in which the Eighth Circuit held that a defendant who had not raised a *Bailey* claim at trial or in his initial brief on direct appeal had waived it. This Court subsequently vacated and remanded *McKinney* for further consideration in light of *Johnson* v. *United States*, 117 S. Ct. 1544 (1997). *McKinney* v. *United States*, 117 S. Ct. 1816 (1997). On remand in *McKinney*, the Eighth Circuit applied plain error analysis rather than the waiver theory on which the district court in this case had relied. *United States* v. *McKinney*, 120 F.3d 132 (1997).

order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255." 110 Stat. 1217, 28 U.S.C. 2253(c)(1) (Supp. II 1996). A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* at 1218, 28 U.S.C. 2253(c)(2) (Supp. II 1996).

b. On July 29, 1996, petitioner filed a notice of appeal from the district court's decision denying his motion. J.A. 40. The court of appeals treated the notice of appeal as an application for a certificate of appealability. J.A. 1, 4, 41. The case was docketed in the court of appeals as No. 96-3118, and the record was transferred to the court of appeals from the district court. J.A. 3, 4. The court of appeals referred the application to a panel consisting of three circuit judges. J.A. 4.

The panel of the court of appeals denied petitioner a certificate of appealability, concluding that he had not made a "substantial showing of the denial of a constitutional right." J.A. 41-42. The court reasoned that, because petitioner's claim relies on *Bailey*, "petitioner is not making a constitutional claim. He is making a claim to a federal statutory right." J.A. 42. Because "*Bailey* did no more than interpret a statute, and an incorrect application of a statute by a district court, or any other court, does not violate the Constitution," the court of appeals denied a certificate of appealability. *Ibid.*

Judge McMillian dissented. J.A. 42-48. After noting that courts have granted post-conviction relief following a change in the law, the dissent stated that "a judgment in a criminal case in which the prosecution has offered and the record discloses no proof

whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law." J.A. 47 (quoting *United States* v. *Liguori*, 438 F.2d 663, 669 (2d Cir. 1971)). The dissent also believed that petitioner had "cause" for failing to challenge the jury instructions on appeal "[b]ecause *Bailey* represents such a clear break with precedent regarding the definition of 'use' under § 924(c)(1)." J.A. 48. Accordingly, the dissent concluded that this case presented a "substantial showing of the denial of a constitutional right." *Ibid.*

c. Petitioner sought rehearing, with a suggestion for rehearing en banc. In opposing further review, the government took the position that the panel's decision was correct. The full court of appeals denied rehearing en banc, with Judges McMillian, Beam, Loken, and Hansen dissenting. J.A. 49.

4. On May 12, 1997, petitioner filed a petition for a writ of certiorari in this Court, invoking the Court's jurisdiction under 28 U.S.C. 1254(1). The petition sought review of the court of appeals' holding that petitioner was not entitled to a certificate of appealability because his claim—that he is presently incarcerated for conduct that, under *Bailey*, is not criminal—raises a statutory, not a constitutional, issue. The government filed a brief in response, agreeing that claims of the kind raised by petitioner in his motion under Section 2255 may fairly be characterized as "constitutional," and that the court of appeals erred in concluding otherwise. The government suggested that the judgment of the court of appeals should be vacated and the case remanded for further consideration whether a certificate of appealability should issue. Gov't Br. in Resp. 7, 15.

On October 31, 1997, the Court granted certiorari limited to the question whether, in light of the fact that the court of appeals denied petitioner's request for a certificate of appealability, the Court has jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Solicitor General. The Court invited Jeffrey S. Sutton, Esquire, of Columbus, Ohio, to brief and argue this case, as amicus curiae, against the Court's jurisdiction. J.A. 50.

SUMMARY OF ARGUMENT

This Court has jurisdiction under the All Writs Act to grant a common-law writ of certiorari to review the court of appeals' denial of petitioner's application for a certificate of appealability, vacate the judgment of the court of appeals, and remand for further consideration whether a certificate should issue. The Court first held in *House* v. *Mayo*, 324 U.S. 42 (1945) (per curiam), that it had jurisdiction to review the denial of an application for a certificate of probable cause—the predecessor and functional equivalent of a certificate of appealability. The Court has exercised certiorari jurisdiction in that context at least 14 times since *House*.

The Court's jurisdiction was not affected by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. In the AEDPA, Congress extended to Section 2255 motions filed by federal prisoners, such as petitioner, the requirement that state prisoners petitioning for habeas corpus under 28 U.S.C. 2254 must obtain a certificate authorizing appeal before they may appeal the denial of their petitions. Congress thus eliminated prisoners' appeals as of right from denials of Section 2255 motions. Congress did not, however,

limit this Court's discretion to review by writ of certiorari the denial of an application for a certificate of appealability.

There are two possible bases for the Court's power to review denials of certificates of appealability—the statutory certiorari jurisdiction under 28 U.S.C. 1254(1) and the authority to issue common-law writs of certiorari under the All Writs Act, 28 U.S.C. 1651(a). The Court lacks jurisdiction under Section 1254(1) to review the merits of an underlying Section 2255 motion until a certificate of appealability has issued. Absent a certificate, a court of appeals lacks jurisdiction to review the merits of a Section 2255 motion, and the motion is therefore not "in" the court of appeals within the meaning of Section 1254(1). The Court arguably has jurisdiction under Section 1254(1), however, to review the denial by a court of appeals of an application for a certificate of appealability. Applications for certificates of appealability, which the courts of appeals have jurisdiction to decide under 28 U.S.C. 2253(c) (Supp. II 1996), see *In re Burwell*, 350 U.S. 521, 522 (1956) (per curiam), could be viewed as "cases in the courts of appeals."

Nonetheless, jurisdiction under Section 1254(1) appears to be foreclosed by this Court's precedent. See, *e.g.*, *House* v. *Mayo*, *supra*. On the assumption that jurisdiction is unavailable under Section 1254(1), however, this Court's precedent makes it clear that the Court has jurisdiction to review the denial of a certificate in petitioner's case by a common-law writ of certiorari under the All Writs Act.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW BY COMMON-LAW WRIT OF CERTIORARI THE ORDER OF THE COURT OF APPEALS DENYING PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY

This Court's jurisdiction to review the denial by a court of appeals of a certificate authorizing appeal from a decision on collateral review was explored most recently in an exchange of opinions between Justices Rehnquist and Stevens in *Davis* v. *Jacobs*, 454 U.S. 911 (1981). Justice Stevens contended that this Court's jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to review denials of certificates was settled in *House* v. *Mayo*, 324 U.S. 42 (1945) (per curiam). See 454 U.S. at 912-914 (Stevens, J., respecting the denial of certiorari). Justice Rehnquist maintained that *House* was inconsistent with the principles governing the exercise of All Writs Act jurisdiction and with Congress's decision to make a certificate a prerequisite to appellate consideration of a petition for collateral review. See *id.* at 915-919 (Rehnquist, J., dissenting from the denial of certiorari); see also *Jeffries* v. *Barksdale*, 453 U.S. 914 (1981) (Rehnquist, J., dissenting from the denial of certiorari).

In our view, *House* and later cases firmly establish this Court's jurisdiction under the All Writs Act to review a court of appeals' denial of a certificate granting leave to appeal a petition for habeas corpus under 28 U.S.C. 2254. That jurisdiction was not revoked when Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, extended the certificate require-

ment to appeals from denials of Section 2255 motions, such as petitioner's. Although 28 U.S.C. 1254(1) could be read to provide jurisdiction to review the denial of a certificate, that reading of Section 1254(1) appears foreclosed by this Court's precedent, which instead bases jurisdiction on the All Writs Act. That use of the All Writs Act is fully consistent with the cases and principles defining the scope of this Court's jurisdiction under that Act.

A. The Court's Precedent Firmly Establishes Certiorari Jurisdiction To Review The Denial Of A Certificate Of Appealability, And That Jurisdiction Was Not Revoked By The AEDPA

1. In *House* v. *Mayo*, 324 U.S. 42 (1945) (per curiam), this Court held that it had certiorari jurisdiction to review the denial of a certificate of probable cause—the predecessor and functional equivalent of a certificate of appealability. The Court has exercised certiorari jurisdiction in that context at least 14 times since *House*.

Since 1908, a state prisoner seeking to appeal a district court's denial of a petition for habeas corpus has been required first to secure a certificate of probable cause. See 28 U.S.C. 2253 (1994).[2] In *House*, the district court denied House's petition for habeas corpus

[2] Before enactment of the AEDPA, Section 2253 stated: "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." That requirement originated in the Act of March 10, 1908, ch. 76, 35 Stat. 40. The requirement was subsequently amended by the Act of February 13, 1925, ch. 229, §§ 6(d), 13, 43 Stat. 940, 942, and the Act of June 25, 1948, ch. 646, § 2253, 62 Stat. 967.

and declined to issue a certificate, and the court of appeals rejected his application to appeal in forma pauperis because House had not secured a certificate. 324 U.S. at 43-44. The court of appeals did not consider whether it should issue a certificate. *Id.* at 44. Holding that the court of appeals "erred in not considering whether the case was an appropriate one for a certificate of probable cause" and that the district court erred in denying the petition, this Court reversed both the court of appeals and the district court. *Id.* at 48. The Court stated that it did not have jurisdiction to take that action under 28 U.S.C. 347(a) (1940), the predecessor to Section 1254(1), but had jurisdiction to issue a common-law writ of certiorari under the All Writs Act (then codified at 28 U.S.C. 377 (1940)). 324 U.S. at 44; see page 21, *infra*.

At least 14 times since *House*, this Court has granted certiorari to review the decision of a court of appeals denying an application for a certificate of probable cause. See *Burwell* v. *Teets*, 350 U.S. 808, 809 (1955) (per curiam); *Rogers* v. *Teets*, 350 U.S. 809 (1955) (per curiam); *United States ex rel. Jennings* v. *Ragen*, 358 U.S. 276, 277 (1959) (per curiam); *In re Shuttlesworth*, 369 U.S. 35 (1962) (per curiam); *Maxwell* v. *Bishop*, 385 U.S. 650 (1967) (per curiam); *Walker* v. *Wainwright*, 390 U.S. 335, 336-337 (1968) (per curiam); *Conway* v. *California Adult Auth.*, 393 U.S. 1062 (order granting petition for certiorari), cert. dismissed, 396 U.S. 107, 109 (1969) (per curiam); *Humphrey* v. *Cady*, 401 U.S. 973 (1971) (order granting petition for certiorari), opinion issued, 405 U.S. 504, 506 (1972); *Smith* v. *Digmon*, 434 U.S. 332, 333-334 (1978) (per curiam); *Allen* v. *Hardy*, 478 U.S. 255, 257-258 (1986) (per curiam); *Graham* v. *Lynaugh*, 492 U.S. 915 (1989) (order granting petition for

certiorari, vacating the decision of the court of appeals, and remanding); *Selvage* v. *Lynaugh*, 493 U.S. 888, 889 (1989) (order granting petition for certiorari), opinion issued *sub nom. Selvage* v. *Collins*, 494 U.S. 108, 109-110 (1990) (per curiam); *Lozada* v. *Deeds*, 498 U.S. 430, 431 (1991) (per curiam); *Lynce* v. *Mathis*, 116 S. Ct. 1671 (1996) (order granting petition for certiorari), opinion issued, 117 S. Ct. 891, 893 (1997).[3] Thus, this Court's precedent firmly establishes its certiorari jurisdiction to review the denial by a court of appeals of an application for a certificate of probable cause.[4]

2. In 1996, Congress enacted the AEDPA, which extensively revised the law of post-conviction review. Before the AEDPA, federal prisoners were entitled to an appeal as of right on the merits of their Section 2255 motions. Section 102 of the AEDPA amended 28 U.S.C. 2253 to require both federal and state prisoners to obtain a "certificate of appealability"

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[3] The Court has also commented on questions certified to it by a court of appeals in which an application for a certificate was pending. *In re Burwell*, 350 U.S. 521, 522 (1956) (per curiam).

[4] The precedent also demonstrates that this Court has jurisdiction under the All Writs Act, in an appropriate case, to review the merits of an underlying Section 2255 motion, where the court of appeals erroneously failed to issue a certificate of appealability. See *House*, 324 U.S. at 44; cf. *Holiday* v. *Johnston*, 313 U.S. 342, 348 n.2 (1941) (reversing court of appeals' denial of leave to appeal in forma pauperis and reaching merits of appeal). It would be premature for the Court to review the merits of petitioner's Section 2255 motion at this time, however, for the reasons stated in our brief in response to the petition (at 9-10, 14-15). See also pages 32-34, *infra* (explaining that the Court should not itself issue petitioner a certificate of appealability).

as a condition to appeal. 110 Stat. 1217, 28 U.S.C. 2253(c)(1) (Supp. II 1996). The AEDPA thus extended to federal prisoners the requirement that a prisoner secure authorization before a court of appeals may review the merits of his Section 2255 motion and changed the name of the required authorization to a "certificate of appealability." The AEDPA made no changes, however, that can be interpreted to revoke the well established jurisdiction of the Supreme Court to review a denial by a court of appeals of a certificate.[5]

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[5] The revised provision states that, "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255." § 102, 110 Stat. 1217, 28 U.S.C. 2253(c)(1) (Supp. II 1996). One difference between the revised provision and the prior version of Section 2253 (see note 2, *supra*) is that Congress deleted the explicit authorization for "the justice or judge who rendered the order" to issue a certificate. Several courts of appeals, however, have concluded that the reference to any "circuit justice or judge" includes district judges. See *Tiedeman* v. *Benson*, 122 F.3d 518, 522 (8th Cir. 1997); *United States* v. *Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997); *United States* v. *Eyer*, 113 F.3d 470, 473 (3d Cir. 1997); *Houchin* v. *Zavaras*, 107 F.3d 1465, 1468-1469 (10th Cir. 1997); *Lozada* v. *United States*, 107 F.3d 1011, 1016 (2d Cir. 1997), abrogated on other grounds by *United States* v. *Perez*, 129 F.3d 255 (2d Cir. 1997); *Lyons* v. *Ohio Adult Parole Auth.*, 105 F.3d 1063, 1073 (6th Cir.), cert. denied, 117 S. Ct. 1724 (1997); *Else* v. *Johnson*, 104 F.3d 82, 83 (5th Cir. 1997); *Hunter* v. *United States*, 101 F.3d 1565, 1583-1584 (11th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 1695 (1997); see also 1st Cir. R. 22.1(b); 7th Cir. R. 22.1(b); Fed. R. App. P. 22(b) (authorizing district judges to grant certificates). The AEDPA did make two other changes to Section 2253, but they are not relevant to the jurisdictional issue. First, the

Notably absent from the revised language of Section 2253 is a statement restricting this Court's certiorari jurisdiction to review decisions by the courts of appeals on applications for certificates. Congress is presumed to legislate with a full understanding of existing law, including this Court's precedents. See *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995); *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979). Thus, had Congress intended to revoke the firmly established jurisdiction of this Court, it would have done so expressly. Indeed, other provisions of the AEDPA demonstrate that, when Congress desires to limit the Court's certiorari power, it knows how to do so. The AEDPA amended 28 U.S.C. 2244 to create a new requirement that a court of appeals authorize the filing of a second or successive habeas corpus application. See § 106, 110 Stat. 1221, 28 U.S.C. 2244(b)(3)(A) (Supp. II 1996). Congress specifically provided that the "grant or denial of an authorization * * * shall not be appealable and shall not be the subject of a petition * * * for a writ of certiorari." *Ibid.*, 28 U.S.C. 2244(b)(3)(E) (Supp. II 1996). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The logical conclusion, therefore, is that Congress did not

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AEDPA codified the showing necessary to justify issuance of a certificate. § 102, 110 Stat. 1218, 28 U.S.C. 2253(c)(2) (Supp. II 1996). Second, it required that the certificate "indicate which specific issue or issues satisfy th[at] showing." *Ibid.*, 28 U.S.C. 2253(c)(3) (Supp. II 1996).

intend to restrict this Court's certiorari jurisdiction to review denials of applications for certificates of appealability. See *Lindh* v. *Murphy*, 117 S. Ct. 2059, 2068 (1997) (reasoning that, because the AEDPA expressly provides that the new amendments regarding habeas proceedings in capital cases apply to pending cases, by negative implication the amendments in the noncapital context apply only to cases filed after enactment). See also *Felker* v. *Turpin*, 116 S. Ct. 2333, 2338-2339 (1996) (noting this Court's hesitance to find that its jurisdiction has been repealed by implication and concluding that the AEDPA's preclusion of certiorari jurisdiction in Section 2244(b)(3)(E) did not restrict this Court's jurisdiction to entertain original writs of habeas corpus).

B. The Court's Precedent Supports Certiorari Jurisdiction Under The All Writs Act

1. There are two possible bases for the Court's jurisdiction to review denials of certificates of appealability. One possible basis is the Court's statutory certiorari power under 28 U.S.C. 1254(1), and the other is its power to issue common-law writs of certiorari under the All Writs Act, 28 U.S.C. 1651(a). Section 1254(1) authorizes the Court to grant certiorari to review "cases in the courts of appeals." Section 1651(a) authorizes the Court to grant "all writs necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law."

A case is "in" the court of appeals within the meaning of Section 1254(1) only if the case is docketed and pending in the court of appeals. See *Gay* v. *Ruff*, 292 U.S. 25, 30 (1934). In addition, this Court may review the merits of the case only if the court of appeals properly has jurisdiction to do so. See *Nixon* v. *Fitz-*

gerald, 457 U.S. 731, 742-743 & n.23 (1982); *United States* v. *Nixon*, 418 U.S. 683, 690 (1974).[6] A court of appeals lacks jurisdiction to review the merits of a prisoner's Section 2255 motion unless the prisoner first obtains a certificate authorizing an appeal. See § 102, 110 Stat. 1217, 28 U.S.C. 2253(c)(1) (Supp. II 1996) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals"). Therefore, in the absence of a certificate of appealability, the Supreme Court lacks jurisdiction to issue a writ of certiorari under Section 1254(1) to review the merits of a Section 2255 motion even if the court of appeals has passed on the merits. See *McCarthy* v. *Harper*, 449 U.S. 1309, 1310 (1981) (Rehnquist, J., in chambers).

The Supreme Court might nonetheless have jurisdiction under Section 1254(1) to review the decision of a court of appeals on an application for a certificate of appealability. The Court explained in *In re Burwell*, 350 U.S. 521 (1956) (per curiam), that a court of appeals has jurisdiction under Section 2253 to pass on

[6] If there is a question whether the court of appeals has jurisdiction to review the merits of a case, this Court has jurisdiction to resolve that question. See, *e.g.*, *Nixon* v. *Fitzgerald*, 457 U.S. at 743 & n.23 (reversing court of appeals' dismissal for lack of jurisdiction and noting that "[t]here can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction"); *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478, 479 (1978) (affirming court of appeals' dismissal for lack of jurisdiction); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 370 (1981) (reversing court of appeals for improperly exercising jurisdiction); *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737, 740 (1976) (same).

an application for a certificate. *Id.* at 522.[7] Thus, an application, such as petitioner's, that has been dock-

[7] Nothing in the amendments to Section 2253 made by the AEDPA alters the conclusion in *In re Burwell*. The language that gives a court of appeals jurisdiction to issue a certificate was not changed. Compare § 102, 110 Stat. 1217, 28 U.S.C. 2253(c)(1) (Supp. II 1996) ("[u]nless a circuit justice or judge issues a certificate of appealability") with 28 U.S.C. 2253 (1952) ("unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause").

The language in both versions of Section 2253 could be read to give authority to issue a certificate to an individual judge rather than a court. In *In re Rogers*, 350 U.S. 521 n.* (1956), the companion case to *In re Burwell*, the Ninth Circuit contended that Section 2253 did not give jurisdiction to the court of appeals, "as a court," to rule on an application for a certificate of probable cause. See *In re Rogers*, On Certificate of Questions from the United States Court of Appeals for the Ninth Circuit at 8-10. This Court rejected the Ninth Circuit's argument and explained that the Court had held in *Burwell* v. *Teets*, *supra*, and *Rogers* v. *Teets*, *supra*, that Section 2253 gives the courts of appeals jurisdiction to issue certificates of probable cause. *In re Burwell*, 350 U.S. at 522. Despite the decision in *In re Burwell*, some confusion has persisted whether jurisdiction lies in a court of appeals as a "court" or as an assemblage of "judges." Compare Fed. R. App. P. 22(b) advisory committee's note (1967 adoption) (judges have jurisdiction) with *Ojeda Rios* v. *Wigen*, 863 F.2d 196, 200 n.3 (2d Cir. 1988) (Newman, J., in chambers) (calling Advisory Committee interpretation of *In re Burwell* "somewhat surprising" and maintaining court has jurisdiction). See also *Lara* v. *Nelson*, 449 F.2d 323, 324 (9th Cir. 1971) (citing Rule 22(b) and suggesting that judges, rather than court, have jurisdiction); *Ex parte Farrell*, 189 F.2d 540, 543 (1st Cir.) (suggesting court has jurisdiction), cert. denied, 342 U.S. 839 (1951). In any event, if Section 2253 does not give the courts of appeals jurisdiction to pass on an application for a certificate, they likely have that authority under the All Writs Act. See *Ojeda Rios*, 863 F.2d at 200 n.3.

eted in the court of appeals could be said to be properly "in the court[] of appeals." This Court would still not have jurisdiction to review the decision on the application, however, unless the application is a "case," distinct from the underlying Section 2255 motion.[8]

The Court's treatment of certain analogous matters may support the proposition that an application for a certificate of appealability is a "case" under Section 1254(1). For example, this Court has considered appeals from interlocutory orders to be "cases in the courts of appeals" under Section 1254(1). See *Nixon* v. *Fitzgerald*, 457 U.S. at 742 (rejecting argument that the appeal of an order denying immunity claim "was not an appealable 'case' properly 'in' the Court of Appeals within the meaning of §1254"); *United States* v. *Nixon*, 418 U.S. at 692 (referring to the appeal of a denial of a motion to quash a subpoena as a "case * * * now properly before this Court on [a] writ of certiorari" under Section 1254(1)). The underlying damages action in *Nixon* v. *Fitzgerald*, 457 U.S. at 740-741, and criminal prosecution in *United States* v. *Nixon*, 418 U.S. at 687-688, had not yet gone to trial in the district court, and, like Section 2255 proceedings

[8] A similar issue may arise in *Stewart* v. *Martinez-Villareal*, No. 97-300 (to be argued Feb. 25, 1998), should the Court decide that 28 U.S.C. 2244(b)(3)(E) (Supp. II 1996) is not applicable to the facts of that case. In order to review the decision of the Ninth Circuit in *Stewart* under Section 1254(1), the Court would have to find that the proceedings in the court of appeals, in which the court dismissed as unnecessary a motion for authorization to file a second or successive habeas petition, constitute a "case[] in the court[] of appeals" under Section 1254.

in which a certificate of appealability has been denied, were not "in" the court of appeals.[9]

This Court has also apparently treated motions to intervene in cases pending in the courts of appeals as independent "cases" under Section 1254(1). Section 1254(1) permits only a "party to any civil or criminal case" to seek certiorari review. The Court has nonetheless allowed a litigant who has been refused intervention by the court of appeals to obtain review in this Court, but has stated that review extends only to the order denying the motion to intervene. See *International Union, United Automobile Workers* v. *Scofield*, 382 U.S. 205, 208-209 (1965). One explanation for that result is that the Court viewed the motion to intervene as a separate "case" to which the litigant was a "party."[10]

[9] The court of appeals exercised its ordinary appellate jurisdiction under 28 U.S.C. 1291 over the district court orders in the *Nixon* cases, but a court of appeals deciding an application for a certificate of appealability exercises jurisdiction based on Section 2253(c). That distinction, however, does not affect the conclusion whether there is a "case" in the court of appeals under Section 1254(1). The language of Section 1254(1) does not limit the power of review to "cases" arising under any particular jurisdictional authority; and the Court has relied on Section 1254(1) to review a court of appeals' decision denying mandamus, which a court of appeals has jurisdiction to issue not under Section 1291 but under Section 1651(a). See *Schlagenhauf* v. *Holder*, 379 U.S. 104, 109 (1964). Cf. *McClellan* v. *Carland*, 217 U.S. 268, 277 (1910) (holding that the Act of March 3, 1891, ch. 517, 26 Stat. 826, a predecessor to Section 1254(1), which—unlike Section 1254(1)—restricted the Court's certiorari power to certain categories of cases in the courts of appeals, did not authorize the Court to review the denial by a court of appeals of a mandamus petition).

[10] See R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 44 n.11 (7th ed. 1993) ("A would-be,

The Court's view of what constitutes a "case" for purposes of Section 1254(1) thus appears quite broad. Under that broad view, Section 1254(1) could be interpreted to authorize the Court's review, as a separate "case," of a court of appeals' decision denying a certificate, although that authority would not extend to review of the merits of the underlying motion that the court of appeals denied permission to appeal.

That interpretation of Section 1254(1) may find further support in the acknowledged power of the Court under Section 1254(1) to decide whether a court of appeals has properly dismissed a case for lack of jurisdiction. See *Nixon* v. *Fitzgerald*, 457 U.S. at 743 & n.23; note 6, *supra*. The decision by a court of appeals whether to grant a certificate of appealability is functionally equivalent to a decision whether it has jurisdiction to consider the merits of the underlying appeal. There is, however, a distinction between the two situations in form, if not in function, and that distinction may justify treating the two situations differently. By requiring a prisoner to obtain a certificate of appealability in order to authorize an appeal from denial of a habeas petition or Section 2255 motion, Congress has established a two-stage procedure for the appeal, the first stage of which is in essence a

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but unsuccessful, intervenor * * * is considered to be a 'party' to the intervention matter before the court of appeals."). See also *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 30, 34 (1993) (per curiam) (explaining that the Court has certiorari jurisdiction under Section 1254(1) to review an order denying a motion to intervene and holding that, unless the Court reviews and reverses the order, the party denied intervention cannot obtain review under Section 1254(1) of issues presented in the underlying case).

screening process. Unless the prisoner passes that first-stage screen, it may be fair to conclude that Congress did not intend the prisoner's case to be "in" the court of appeals in any sense. In other types of appeals, however, threshold screening is not generally required, so the filing of the notice of appeal itself may be sufficient to lodge the case "in" the court of appeals.

2. In any event, this Court rejected jurisdiction under Section 1254(1) to review a certificate authorizing appeal in *House* v. *Mayo*, *supra*. In *House*, the Court explained that it could not issue a statutory writ of certiorari under a predecessor to Section 1254(1) because the case "was never 'in' the court of appeals, for want of a certificate of probable cause." 324 U.S. at 44. For that proposition, the Court cited *Ferguson* v. *District of Columbia*, 270 U.S. 633 (1926) (per curiam), in which the Court denied "for want of jurisdiction in this [C]ourt" a petition for a statutory writ of certiorari to review the refusal of a Justice of the Court of Appeals of the District of Columbia to allow a writ of error to the Police Court of the District. *Id.* at 634. The Court in *House* noted that, despite the unavailability of a statutory writ, "[b]y virtue of [the All Writs Act] we may grant a writ of certiorari to review the action of the court of appeals in declining to allow an appeal to it." 324 U.S. at 44. Only at that point in its analysis did the Court go on to note: "And not only does our review extend to a determination of whether the circuit court of appeals abused its discretion in refusing to allow the appeal, but if so, it extends also to questions on the merits sought to be raised by the appeal." *Id.* at 44-45. Thus, *House* holds that the Court must rely on the All Writs Act to review the denial of a certificate.

The Court viewed *House* as another in a group of cases in which it had used the common-law writ of certiorari to review decisions by appellate courts declining to allow appeals. See 324 U.S. at 44. The first of those cases, *In re 620 Church Street Bldg. Corp.*, 299 U.S. 24, 26 (1936), involved the denial of leave to appeal in a bankruptcy proceeding. Significantly, in that case, the Court reviewed only the decision of the court of appeals denying leave to appeal and not the merits of the underlying case. And, in that case, as in *House*, the Court held that it lacked jurisdiction to issue a statutory writ of certiorari. See 299 U.S. at 26.

The other cases on which the Court relied in *House* involved decisions by courts of appeals denying requests for leave to appeal in forma pauperis (IFP). See *Holiday* v. *Johnston*, 313 U.S. 342, 348 n.2 (1941); *Wells* v. *United States*, 318 U.S. 257 (1943); *Steffler* v. *United States*, 319 U.S. 38 (1943). In one of those cases as well, the Court reviewed only the decision of the court of appeals denying leave to appeal and not the merits of the underlying case. See *Wells*, *supra*.[11]

Some of the cases decided since *House* seem to confirm that Section 1254(1) does not provide jurisdiction

[11] In *Holiday* and *Steffler*, the Court expressly noted that it had jurisdiction under the All Writs Act and considered not only the denial of leave to appeal IFP but also the merits of the appeal. See *Holiday*, 313 U.S. at 348-354 & n.2; *Steffler*, 319 U.S. at 39-41. In *Wells*, the Court neither discussed the basis for its jurisdiction nor the merits of the appeal. Before granting the petition for certiorari in *Wells*, however, the Court granted a motion for leave to file the petition, a procedural step indicating reliance on the common-law writ. See 317 U.S. 616 (1942); Sup. Ct. R. 31.1 (1979) (requiring motion for leave to file extraordinary writs) (repealed by 1980 revisions).

to review the denial of a certificate granting leave to appeal. In *Maxwell* v. *Bishop*, *supra*, the Court relied on the All Writs Act when it reversed the denial of a certificate of probable cause without passing on the merits of the underlying habeas petition.[12] And the opinions of Justices Rehnquist and Stevens in *Davis* and *Jeffries* appear to accept the proposition that statutory certiorari is not available to review action on an application for a certificate. See *Davis*, 454 U.S. at 912 (Stevens, J., respecting the denial of certiorari); *id.* at 916-917 (Rehnquist, J., dissenting from the denial of certiorari); *Jeffries*, 453 U.S. at 915-916 (Rehnquist, J., dissenting from the denial of certiorari).

3. Many of the cases decided since *House*, however, raise some doubt whether the Court has adhered to the view that it lacks jurisdiction under Section 1254(1) to review the denial of a certificate. In some cases in which the courts of appeals denied certificates, this Court did not discuss the basis for its jurisdiction and failed to follow its rule requiring it to grant leave to file before accepting a petition for common-law certiorari, see Sup. Ct. R. 31.1 (1979) (re-

[12] The Court did not state the basis for its jurisdiction, but its reliance on the common-law writ is clear from its grant of a motion for leave to file the petition for certiorari. *Maxwell*, 385 U.S. at 650; see note 11, *supra*. Several of the later IFP cases also clearly relied on the common-law writ, even though the Court did not grant a motion for leave to file the petition. See *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 336 (1948) (citing *Steffler*, *supra*); *Sentner* v. *United States*, 348 U.S. 935 (1955) (per curiam) (citing *Adkins*, *supra*). See also *Pollard* v. *United States*, 350 U.S. 965 (1956) (order granting petition for certiorari), opinion issued, 352 U.S. 354, 358 & n.2 (1957) (citing *Wells*, *supra*, but also reviewing the merits of the underlying appeal).

pealed by 1980 revisions).[13] The Court acted similarly in many of the later cases in which it reviewed denials of leave to appeal IFP.[14] In cases after 1980, the Court

[13] See, *e.g.*, *Burwell* v. *Teets*, *supra*; *Rogers* v. *Teets*, *supra*; *United States ex rel. Jennings* v. *Ragen*, *supra*; *In re Shuttlesworth*, *supra*; *Walker* v. *Wainwright*, *supra*; *Conway* v. *California Adult Auth.*, *supra* (order granting petition for certiorari); *Humphrey* v. *Cady*, 401 U.S. 973 (1971) (same); *Smith* v. *Digmon*, *supra*.

[14] See, *e.g.*, *Carafas* v. *LaVallee*, 389 U.S. 896 (1967) (order granting petition for certiorari), opinion issued, 391 U.S. 234, 241 (1968); *Nowakowski* v. *Maroney*, 384 U.S. 984 (1966) (order granting petition for certiorari), opinion issued, 386 U.S. 542, 543 (1967) (per curiam); *Ragan* v. *Cox*, 369 U.S. 437 (1962) (per curiam); *Coppedge* v. *United States*, 366 U.S. 959 (1961) (order granting petition for certiorari), opinion issued, 369 U.S. 438, 452 (1962); *Simcox* v. *Madigan*, 366 U.S. 765 (1961) (per curiam); *Lurk* v. *United States*, 365 U.S. 802 (order granting petition for certiorari), opinion issued, 366 U.S. 712 (1961) (per curiam); *Douglas* v. *Green*, 363 U.S. 192, 193 (1960) (per curiam); *Willis* v. *United States*, 362 U.S. 216 (1960) (per curiam); *McAbee* v. *United States*, 361 U.S. 537 (1960) (per curiam); *Smith* v. *United States*, 361 U.S. 38 (1959) (per curiam); *Smith* v. *United States*, 361 U.S. 13 (1959) (per curiam); *Page* v. *United States*, 359 U.S. 116 (1959) (per curiam); *Kitchens* v. *United States*, 358 U.S. 42 (1958) (per curiam); *Hansford* v. *United States*, 357 U.S. 578 (1958) (per curiam); *Cash* v. *United States*, 357 U.S. 219 (1958) (per curiam); *Hill* v. *United States*, 356 U.S. 704 (1958) (per curiam); *Ellis* v. *United States*, 356 U.S. 674, 675 (1958) (per curiam); *Edwards* v. *United States*, 355 U.S. 36 (1957) (per curiam); *Delbridge* v. *United States*, 354 U.S. 906 (1957) (per curiam); *Farley* v. *United States*, 354 U.S. 521, 522 (1957) (per curiam); *Johnson* v. *United States*, 352 U.S. 565, 566 (1957) (per curiam). The apparent shift from common-law to statutory certiorari in the IFP cases may reflect the change in appellate procedure from a system requiring an application for allowance of an appeal, see 28 U.S.C. 230 (1940) (cited in *Steffler*, 319 U.S. at 40), to a system requiring only the filing of a notice of appeal, see Fed. R. Civ. P. 73(a) (1952) (superseding Section 230). See D. Oaks, *The "Original" Writ of Habeas Corpus*, 1962 Sup. Ct. Rev. 153, 186 n.151. The Court, however, continued to use common-law certiorari even after that change. See, *e.g.*, *Pollard*, 352 U.S. at 358 n.2 (citing *Wells* to explain basis for the Court's jurisdiction).

was silent on the basis for its jurisdiction, which is surprising if the Court was relying on an extraordinary writ under the All Writs Act.[15]

Finally, in *In re Burwell*, *supra*, the Court commented on three questions certified by the Ninth

[15] See, *e.g.*, *Allen* v. *Hardy*, *supra*; *Graham* v. *Lynaugh*, *supra*; *Selvage* v. *Lynaugh*, *supra* (order granting petition for certiorari); *Lozada* v. *Deeds*, *supra*; *Lynce* v. *Mathis*, 116 S. Ct. 1671 (1996) (order granting petition for certiorari). In at least four of those cases, the petitioner invoked the Court's jurisdiction under Section 1254(1). See Pet. at 2, *Allen* v. *Hardy*, No. 85-6593; Pet. at 1, *Graham* v. *Lynaugh*, No. 88-5792; Pet. Br. at 1, 1989 WL 435477, at *1, *Selvage* v. *Lynaugh*, No. 87-6700; Pet. Br. at 1, 1996 WL 419841, at *1, *Lynce* v. *Mathis*, No. 95-7452.

In *Lynce*, as well as in several of the cases cited in notes 13 and 14, *supra*, the Court also addressed the merits of the underlying appeal. See, *e.g.*, *In re Shuttlesworth*, *supra*; *Humphrey*, 405 U.S. at 506; *Smith* v. *Digmon*, 434 U.S. at 333-334; *Douglas* v. *Green*, *supra*. That action does not necessarily demonstrate, however, that the Court relied on All Writs Act jurisdiction rather than Section 1254(1). It may be that the Court first exercised its jurisdiction under Section 1254(1) to review and reverse the court of appeals' denial of leave to appeal. Upon reversal of the court of appeals' decision on that issue, the underlying case itself was properly in the court of appeals, and therefore the Court could have exercised Section 1254(1) jurisdiction to decide the merits. Cf. *Nixon* v. *Fitzgerald*, 457 U.S. at 743 n.23 (declining, in the interest of judicial economy, to remand after reversing court of appeals' dismissal of interlocutory appeal for lack of jurisdiction and instead reaching the merits).

Circuit during its consideration of Burwell's application for a certificate of probable cause. The Court's jurisdiction to consider certified questions could only have rested on 28 U.S.C. 1254(3) (1952), which, like Section 1254(1), was dependent on the existence of a "case[] in the court[] of appeals." Although the Court ultimately dismissed the certificates, see Sup. Ct. R. 19.3, it did so not because there was no case in the court of appeals but because it had already answered two of the questions and the answer to the third lay in the discretion of the court of appeals. See *In re Burwell*, 350 U.S. at 522; 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4038, at 112 & n.34 (2d ed. 1996).

In none of those cases, however, did the Court explicitly analyze whether or on what basis it had jurisdiction. Therefore, the cases should not be read to have reversed the ruling in *House* that jurisdiction to review the denial of a certificate rests not on Section 1254(1) but on the All Writs Act. See *Hagans* v. *Lavine* 415 U.S. 528, 535 n.5 (1974) (explaining that, "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us").

C. All Writs Act Principles Justify The Use Of Common-Law Certiorari To Review Denials Of Certificates Of Appealability In Appropriate Cases

The All Writs Act authorizes this Court to issue extraordinary or common-law writs when (1) "necessary or appropriate in aid of [its] jurisdiction[]" and (2) "agreeable to the usages and principles of law." See 28 U.S.C. 1651(a). Using a common-law writ of certiorari to review the court of appeals' denial to

petitioner of a certificate of appealability is fully consistent with that authorization.

Although "sparingly exercised," *Parr* v. *United States*, 351 U.S. 513, 520 (1956), this Court's power under the All Writs Act is quite broad. See *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 254-255 (1957); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) ("The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court."). This Court is "slow to reach a conclusion which would deprive the [C]ourt of the power to issue the [common-law] writ [of certiorari] in proper cases to review the action of the Federal courts inferior in jurisdiction to this [C]ourt." *McClellan* v. *Carland*, 217 U.S. 268, 279 (1910). "The suggestion, therefore, that this case should be dismissed for want of power in this [C]ourt to grant the writ of certiorari cannot be entertained." *Ibid.*

1. *If review of the order of the court of appeals is unavailable under Section 1254(1), resort to a common-law writ of certiorari is "necessary" "in aid of" this Court's appellate jurisdiction*

A common-law writ of certiorari to review the court of appeals' denial of petitioner's application for a certificate of appealability is necessary in aid of this Court's appellate jurisdiction.[16] Issuance of a writ in

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[16] Issuance of extraordinary writs to the courts of appeals is a constitutionally permissible exercise of this Court's appellate power under Article III. See, *e.g.*, *Ex parte Crane*, 30 U.S. (5 Pet.) 190, 193 (1831) ("mandamus to an inferior court of the United States[] is in the nature of appellate jurisdiction"). See also *Felker* v. *Turpin*, 116 S. Ct. at 2339 (treating consideration of original writ of habeas corpus in this Court as an exercise of appellate jurisdiction); *id.* at 2341 n.1 (Souter, J., concurring) (explaining that habeas petition, although filed in the first

this case is necessary both to prevent unauthorized action by the court of appeals from precluding the Court's exercise of its appellate function and to enable the Court to supervise the courts of appeals in their application of Section 2253(c).

"[W]here a case is within the appellate jurisdiction of the higher court [an extraordinary writ] may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below." *McClellan*, 217 U.S. at 280. Thus, "this [C]ourt ha[s] the power to issue [an extraordinary writ] to compel the Circuit Courts to proceed to final judgment in order that this [C]ourt may exercise the jurisdiction of review given by law." *Ibid.* See, *e.g.*, *Ex parte United States*, 287 U.S. 241, 246 (1932) (mandamus to require a district court to issue a bench warrant); *Ex parte Kawato*, 317 U.S. 69, 71 (1942) (mandamus to require a district court to allow Japanese resident alien to prosecute libel in admiralty). If the court of appeals erroneously denied petitioner a certificate of appealability, this Court would be wrongfully precluded from exercising, at a later point in the proceedings, its statutory certiorari power to review the merits of petitioner's Section 2255 motion.[17]

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instance in this Court, is "nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction"). Cf. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175 (1803) (the "essential criterion of appellate jurisdiction [is] that it revises and corrects the proceedings in a cause already instituted, and does not create that cause").

[17] See *Ex parte Abdu*, 247 U.S. 27, 28 (1918) (Court has power to use extraordinary writ to review decision by court of appeals refusing to file appeal unless appellant prepays costs because of "[t]he existence of the ultimate discretionary power here to review the cause on its merits and the deterrent influence which the refusal to file must have upon the practical exertion of that power").

A common-law writ of certiorari is also necessary in cases such as petitioner's to enable this Court to conduct its appellate function of supervising the courts of appeals. Cf. *La Buy*, 352 U.S. at 259-260 ("supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system"). Cf. Sup. Ct. R. 10(a) (noting that need for "an exercise of this Court's supervisory power" is a reason for granting certiorari).[18] Extraordinary writs may be used to correct a "clear abuse of discretion," *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382-383 (1953), particularly one that involves a court's refusal to exercise its jurisdiction, *La Buy*, 352 U.S. at 257. Although this Court will not issue mandamus unless the petitioner shows a "clear and indisputable" right to the writ, see, *e.g.*, *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam), the Court does not require a similar showing before issuing common-law certiorari.[19] As discussed at pages 21-23, *supra*, this Court has frequently used the common-

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[18] See also *Schlagenhauf* v. *Holder*, *supra*; *McCullough* v. *Cosgrave*, 309 U.S. 634 (1940) (per curiam); *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U.S. 701 (1927).

[19] Cf. *United States* v. *Dickinson*, 213 U.S. 92, 93 (1909) (declining to allow the government to use common-law writ of certiorari to obtain review of a court of appeals' decision reversing a criminal conviction, and noting that the writ may not be used for "correction of mere error"); *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945) (All Writs Act can "not be availed of to correct a mere error in the exercise of conceded judicial power").

law writ of certiorari to supervise the courts of appeals in cases involving the denial of leave to appeal. Those cases have not always involved a "clear abuse of discretion," as is demonstrated by the fact that, in several of the cases, this Court ultimately affirmed the court of appeals. See, *e.g.*, *In re 620 Church Street Bldg. Corp.*, *supra* (using common-law writ of certiorari to review and affirm denial of leave to appeal in bankruptcy); *Wells* v. *United States*, *supra* (same with respect to denial by court of appeals of leave to appeal in forma pauperis). See also *Allen* v. *Hardy*, *supra* (using writ of certiorari to review and affirm denial of certificate of probable cause).

A common-law writ of certiorari is necessary in this case to correct the erroneous application by the court of appeals of the standard prescribed by Section 2253(c)(2) for issuing certificates of appealability. If the error in this case goes uncorrected, the court of appeals might improperly refuse to perform its appellate function to review habeas petitions and Section 2255 motions. And, if this Court lacks the power to correct the error made by the court of appeals here, it presumably also lacks the power to correct a court of appeals that interprets or applies Section 2253(c) in violation of equal protection or other fundamental constitutional principles.

Finally, use of a common-law writ of certiorari is necessary to enable the Court to ensure uniformity in how the different circuits interpret the standard for issuance of certificates of appealability. Cf. *Forsyth* v. *City of Hammond*, 166 U.S. 506, 512 (1897) ("Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this court, create an unfortunate confusion in respect to the rules of Federal decision.")

Indeed, the Court previously found it necessary to ensure uniformity in the standards used by the courts of appeals to decide applications for certificates of probable cause. See, *e.g.*, *Lozada* v. *Deeds*, 498 U.S. at 432 (concluding that the court of appeals had erred in applying the standards set forth in *Barefoot* v. *Estelle*, 463 U.S. 880, 892-893 (1983), for issuance of a certificate, and noting that two other courts of appeals would have decided the question differently); *Lynce* v. *Mathis*, 117 S. Ct. at 893 (granting certiorari to review the Eleventh Circuit's denial of a certificate "[b]ecause the Court of Appeals for the 10th Circuit reached a different conclusion on similar facts" on the merits of the issue petitioner sought to raise).

Admittedly, a Circuit Justice or this Court as a whole could grant petitioner a certificate of appealability. See *Davis*, 454 U.S. at 913 (Stevens, J., respecting the denial of certiorari); *id.* at 918 (Rehnquist, J., dissenting from the denial of certiorari); § 102, 110 Stat. 1217, 28 U.S.C. 2253(c)(1) (Supp. II 1996) (authorizing "circuit justice" to grant certificate); *In re Burwell*, *supra* (holding that authorization of circuit "judge" to grant certificate empowered court of appeals to grant one).[20] That authority does

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[20] See also *Autry* v. *Estelle*, 464 U.S. 1301, 1302 (1983) (White, J., granting certificate of probable cause after court of appeals had denied it); *Anderson* v. *Collins*, 495 U.S. 943 (1990) (denying application for certificate presented to individual Justice and referred to Court, although two Justices would have granted the application); *O'Rear* v. *Attorney General of Wisconsin*, 484 U.S. 1078 (1988) (denying application presented to individual Justice and referred to Court); *Thomas* v. *Wainwright*, 475 U.S. 1113 (1986) (same); *In re Hunt*, 348 U.S. 968 (1955) (denying application); *Rosoto* v. *Warden*, 83 S. Ct.

not mean, however, that use of a common-law writ of certiorari is not "necessary" in aid of this Court's appellate jurisdiction. A writ is "necessary" in aid of jurisdiction not only if "the [C]ourt could not otherwise physically discharge its appellate duties." See *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273 (1942). Its use must only be "reasonably necessary in the interest of justice." *Id.* at 274; *Price* v. *Johnston*, 334 U.S. 266, 279 (1948). Common-law certiorari is necessary in this case because an original application for a certificate of appealability would be a clumsy and burdensome means to preserve the potential to review the merits of petitioner's Section 2255 motion or to supervise the interpretation by the courts of appeals of the standard for issuing certificates.[21] Passing on petitioner's application would

1788, 1789-1790 (1963) (memorandum of Harlan, J., denying application).

[21] Even if an extraordinary writ were not "necessary" in aid of the Court's jurisdiction, a writ is certainly "appropriate" here. The Court's power to use common-law writs when "appropriate" as well as when "necessary" was clarified by the Act of June 25, 1948, ch. 646, § 1651(a), 62 Stat. 944. That Act consolidated various existing provisions governing use of the common-law writs into Section 1651 and made "necessary changes in phraseology," apparently without intending substantive change. See H.R. Rep. No. 308, 80th Cong., 1st Sess. A144 (1947). The House Report does state, however, that the revised section is "expressive of the construction recently placed upon [the All Writs Act] in *U.S. Alkali Export Assn.* v. [*United States*, 325 U.S. 196 (1945)], and *De Beers Consol. Mines* v. [*United States, supra*]." *Id.* at A145. Those cases reaffirmed the general principle that the All Writs Act may not be used to allow review, particularly interlocutory review, in the face of plain legislative intent to preclude it. In both, however, the Court permitted interlocutory review even though not otherwise authorized by statute and even though

demand far more of this Court's resources than using common-law certiorari to clarify the proper standard for use by the court of appeals. The Court would have to resolve many legal and factual issues that it would not otherwise face. Those issues include whether the certificate requirement applies to Section 2255 motions pending in district court but not in the court of appeals when the AEDPA was enacted, whether petitioner procedurally defaulted on his claim and, if so, whether he has shown cause and prejudice to excuse that default, whether the jury instructions at petitioner's trial on the meaning of "carries" under 18 U.S.C. 924(c)(1) were correct, and whether petitioner's conduct constituted "carr[ying]" under that statute.[22] Thus, use of the common-law writ of certio-

appeal following final judgment was available. Thus, the addition of the word "appropriate" may signify congressional approval of review using the All Writs Act even when review is available in another form, such as through an original application in this Court for a certificate of appealability.

As a prudential matter, this Court has also limited use of the extraordinary writs to cases in which "no other remedy will suffice," *DiBella* v. *United States*, 369 U.S. 121, 125 n.4 (1962), and "'circumstances imperatively demand[]' a departure from the ordinary remedy," *Whitney* v. *Dick*, 202 U.S. 132, 140 (1906). See Sup. Ct. R. 20.1. Those standards, however, are not limitations on this Court's jurisdiction. In any event, the discussion at pages 27-31, *supra*, explaining why use of an extraordinary writ is "necessary" and the Court's repeated use of certiorari to review refusals by the circuit courts to permit appeals, see pages 21-23, *supra*, demonstrate that the prudential standards are met in petitioner's case.

[22] Petitioner might also be able to petition for a writ of habeas corpus under 28 U.S.C. 2241. Petitioner would first have to demonstrate, however, that a motion under Section 2255 "is inadequate or ineffective to test the legality of his detention," 28 U.S.C. 2255. In any event, using a petition for habeas corpus

rari to review the denial by the court of appeals of the certificate of appealability in this case is "necessary" "in aid of" the Court's appellate jurisdiction.

2. *Use of a common-law writ of certiorari is "agreeable to the usages and principles of law"*

Use of the common-law writ of certiorari in this case is not only necessary in aid of this Court's jurisdiction but is "agreeable to the usages and principles of law." In determining whether a particular writ is "agreeable to the usages and principles of law," this Court looks first to the common law. See *United States* v. *Hayman*, 342 U.S. 205, 221 n.35 (1952). The relief available using a particular writ is not confined to the precise forms or uses of the writ at common law before enactment of the All Writs Act but depends on the "usages and principles which have attached themselves to the writ * * * down through the years to the present time." See *Price* v. *Johnston*, 334 U.S. at 282-283.

As early as 1897, this Court held that it "can undoubtedly issue writs of certiorari in all proper cases" under the authority of the All Writs Act. See *In re Chetwood*, 165 U.S. 443, 462 (1897). See also *Whitney* v. *Dick*, 202 U.S. 132, 138 (1906) ("It may be said that the power of this court to issue original and

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as the vehicle to ensure that the courts of appeals are properly interpreting the standard for issuing certificates of appealability would be as cumbersome as using an original application for a certificate. The Court has already exhibited a preference for continued use of certiorari, rather than habeas corpus, to review denials of certificates authorizing an appeal. See, *e.g.*, *In re Shuttlesworth*, 369 U.S. at 35 (treating application for habeas corpus as a petition for certiorari to review circuit judge's denial of certificate of probable cause, granting certiorari, vacating, and remanding to district court).

independent writs of certiorari has been upheld under the authority given by" the All Writs Act). That power is explicitly recognized in the current rules of this Court. See Sup. Ct. R. 20.6 (referring to common-law writs of certiorari).

Like the other extraordinary writs, the common-law writ of certiorari has traditionally been used "to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so." See *U.S. Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 202 (1945). See, *e.g.*, *In re Chetwood*, 165 U.S. at 462 (using common-law writ of certiorari to prevent circuit court from requiring dismissal of writ of error pending in this Court); *Whitney* v. *Dick*, 202 U.S. at 135 (using common-law certiorari to review the propriety of the use by a court of appeals of the writs of habeas corpus and certiorari to reverse a district court criminal conviction).[23]

As discussed above, pages 21-23, *supra*, this Court has repeatedly used the common-law writ of certiorari to require the courts of appeals to entertain appeals that they have refused to allow. See, *e.g.*, *House* v. *Mayo*, *supra*; *Holiday* v. *Johnston*, *supra*. The Court has also used the common-law writ of certiorari to correct legal errors in decisions of the

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[23] See also *Ex parte Crane*, 30 U.S. (5 Pet.) at 193 (Court had power to issue mandamus to order a circuit court to sign bill of exceptions); *Ex parte Bradstreet*, 32 U.S. (7. Pet.) 634, 648 (1833) (mandamus to district court that improperly refused to take a case to trial); *Insurance Co.* v. *Comstock*, 83 U.S. (16 Wall.) 258, 270 (1873) (mandamus may be issued to compel a circuit court to decide an appeal in bankruptcy); *Ex parte Simons*, 247 U.S. 231, 240 (1918) (mandamus to require district court to allow jury trial of suit to enforce a promised bequest).

courts of appeals and district courts when other means of review would not provide an adequate remedy. See, *e.g.*, *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945); *McClellan* v. *Carland*, *supra*; *Whitney* v. *Dick*, *supra*; *In re Chetwood*, *supra*. See also *Far East Conference* v. *United States*, 342 U.S. 570 (1952). Those are the precise functions for which the writ would be exercised in this case.

Use of the writ to review the order by the court of appeals in this case does not conflict with the principle established in *United States* v. *Beatty*, 232 U.S. 463, 467-468 (1914), that the writ cannot be used as a substitute for an authorized appeal when one is available. If the Court adheres to its precedent precluding review under Section 1254(1), the order of the court of appeals denying petitioner a certificate of appealability would not be reviewable except by use of an extraordinary writ. As discussed above, pages 31-34, *supra*, an original application for a certificate in this Court would not be an adequate substitute for direct review of the order.

Nor does use of the common-law writ conflict with the related principle that the All Writs Act should not ordinarily be used to permit review in the face of a plain legislative purpose to preclude review. See, *e.g.*, *Roche*, 319 U.S. at 27-28. This Court's precedent is clear that the lack of statutory certiorari power under Section 1254(1) does not preclude the exercise of jurisdiction under the All Writs Act. See, *e.g.*, *Ex parte Republic of Peru*, 318 U.S. 578, 585 n.4 (1943) (the express grant of statutory certiorari jurisdiction in the Judiciary Act of 1925, the predecessor to Section 1254(1), did not curtail this Court's power to issue common-law writs); *In re 620 Church Street*

Bldg. Corp., 299 U.S. at 26; *McClellan*, 217 U.S. at 277. In *House* v. *Mayo*, 324 U.S. at 44, the Court explicitly held that common-law certiorari was available to review the denial of a certificate of probable cause, despite the fact that Section 2253 prevented an appeal on the merits absent a certificate. And, as discussed above, pages 12-15, *supra*, when Congress extended the certificate requirement to federal prisoners like petitioner, it made no changes to Section 2253 to alter the well established rule that this Court could use the common-law writ to review the denial of a certificate by a court of appeals. Nor is Section 2253's denial of appellate review as of right on the merits of a Section 2255 motion at all inconsistent with this Court's discretionary review of the ruling of a court of appeals on whether to grant an appeal.[24]

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[24] The certificate requirement has its origins in a congressional desire to limit certain frivolous habeas corpus cases. See *Jeffries*, 453 U.S. at 916 (Rehnquist, J., dissenting from denial of certiorari) (citing H.R. Rep. No. 23, 60th Cong., 1st Sess. (1908)). The continued availability of common-law certiorari, however, should not overburden the Court or respondents by increasing the resources spent on review of frivolous habeas petitions and Section 2255 motions. The Court need not review the merits of the underlying petitions and motions and may limit review of the decision whether to grant a certificate to cases such as this one, in which the legal standard applied to deny a certificate was erroneous. In most cases, the Court will easily determine, without need for a response to the petition, that the petitioner has not made the extraordinary showing required for a writ. Finally, eliminating certiorari review would not likely reduce the burden on the Court because petitioners could reformulate their requests for review as original applications for certificates of appealability or original petitions for habeas corpus.

This Court's decisions in *U.S. Alkali*, *supra*, and *De Beers*, *supra*, are not inconsistent with use of the common-law writ in this case. Indeed, they support its use here. In those cases, the petitioners sought interlocutory review of questions arising under a statute that provided for direct appeal to this Court but did not provide for interlocutory appeals. The Court noted in *U.S. Alkali* that use of the common-law writ would generally be inappropriate under those circumstances because of the plain intent to preclude review on appeal. See 325 U.S. at 203. In both cases, however, the Court allowed review because the petitioners alleged that the district court had exceeded its jurisdiction in a manner that could not adequately be corrected except by use of the common-law writ. See *id.* at 203-204; *De Beers*, 325 U.S. at 217. Unlike *U.S. Alkali* and *De Beers*, this case poses no threat to the final judgment rule. Nor, as discussed above, is there any indication here of congressional intent to preclude this Court's review. Finally, review is justified for reasons parallel to those justifying review in the earlier cases: The court of appeals here has refused to exercise its jurisdiction in a manner that cannot be corrected other than by use of the common-law writ.[25]

Finally, this Court's jurisdiction to grant a common-law writ of certiorari is not defeated by peti-

[25] In any event, the principle against use of extraordinary writs to circumvent restrictions on interlocutory appeals that was reaffirmed in *U.S. Alkali* and *De Beers* appears to be prudential rather than jurisdictional. See *La Buy*, 352 U.S. at 255 ("Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them.").

tioner's failure specifically to request such a writ. If the Court has jurisdiction over a case, the Court may review it, even if the parties incorrectly state in their papers filed with the Court the basis of the Court's jurisdiction. Indeed, the Court recognized that principle in *House* v. *Mayo*, *supra*, and granted common-law certiorari even though the petitioner had invoked this Court's statutory certiorari jurisdiction. See also *In re 620 Church Street Bldg. Corp.*, *supra* (granting common-law writ of certiorari to review denial by court of appeals of leave to appeal when petitioner had invoked statutory certiorari jurisdiction); *In re Shuttlesworth*, *supra* (treating application for habeas corpus as a petition for certiorari to review circuit judge's denial of certificate of probable cause, granting certiorari, vacating, and remanding to district court); note 15, *supra*. Indeed, this Court regularly exercises jurisdiction over cases on a different basis than that invoked by the party seeking review. See *Davis*, 454 U.S. at 914 n.3 (Stevens, J., respecting the denial of certiorari) ("We do follow the practice in handling our appellate docket of treating appeals that are improperly taken as though they had been filed as petitions for certiorari and then denying them"). See, *e.g.*, *Head* v. *California*, 374 U.S. 509 (1963) (per curiam) (treating request for writ of common-law certiorari as request for writ of statutory certiorari, granting writ, and vacating and remanding for further consideration); *Barefoot* v. *Estelle*, 463 U.S. at 887 (treating application for a stay of execution as a petition for certiorari).

CONCLUSION

The Court has jurisdiction to grant the petition for certiorari, vacate the judgment of the court of appeals, and remand for further consideration.

Respectfully submitted.

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APPENDIX

1. Section 230 of Title 28, United States Code (1940), provided:

> No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

2. Section 347(a) of Title 28, United States Code (1940), provided:

> (a) In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal.

3. Section 377 of Title 28, United States Code (1940), provided:

> The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

4. Section 1254(1) of Title 28, United States Code, provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

5. Section 1254 of Title 28, United States Code (1952), provided in relevant part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> * * * * *
>
> (3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

6. Section 1651(a) of Title 28, United States Code, provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective

> jurisdictions and agreeable to the usages and principles of law.

7. Section 2241(a) of Title 28, Unites States Code, provides:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

8. Section 2244 of Title 28, United States Code (Supp. II 1996), provides in relevant part:

> (a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.
>
> (b) * * *
>
> * * * * *
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> * * * * *

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

* * * * *

9. Section 2253(c) of Title 28, United States Code (Supp. II 1996), provides:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

10. Section 2253 of Title 28, United States Code (1994), provided in relevant part:*

* * * * *

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

11. Section 2255 of Title 28, United States Code, provides in relevant part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * *

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

---

* The language in the 1952 version of the Code, in effect at the time of the decision in *In re Burwell*, 350 U.S. 521 (1956), was identical to the 1994 version.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

12. Federal Rule of Appellate Procedure 22(b) provides:**

> **(b) Certificate of Appealability.** In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit

** Although the rule as written applies only to habeas petitions by state prisoners, the failure to refer to motions under 28 U.S.C. 2255 by federal prisoners appears to be an oversight. A proposed revision to the rule that would make explicit its application to Section 2255 motions is currently pending before this Court.

judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or its representative, a certificate of appealability is not required.

13. Federal Rule of Civil Procedure 73(a) (1952) provided in relevant part:

> A party may appeal from a judgment by filing with the district court a notice of appeal.

14. Supreme Court Rule 19.3 provides:***

> When a question is certified, the Clerk will notify the parties and docket the case. Counsel shall then enter their appearances. After docketing, the Clerk will submit the certificate to the Court for a preliminary examination to determine whether the case should be briefed, set for argument, or dismissed. No brief may be filed until the preliminary examination of the certificate is completed.

15. Supreme Court Rule 20.1 provides:

> Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To

*** A predecessor version of this provision, Sup. Ct. R. 29.2 (1954), which similarly provided for the possibility of dismissal of a certificate following a preliminary examination, was in effect at the time of *In re Burwell*, 350 U.S. 521 (1956).

justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

16. Supreme Court Rule 20.6 provides:

> If the Court orders the case set for argument, the Clerk will notify the parties whether additional briefs are required, when they shall be filed, and, if the case involves a petition for a common-law writ of certiorari, that the parties shall prepare a joint appendix in accordance with Rule 26.

17. Supreme Court Rule 31.1 (1979) provided in relevant part:****

> The petition in any proceeding seeking the issuance of a writ by this court authorized by 28 U.S.C. § 1651(a) or 28 U.S.C. § 2241 shall be prefaced by a motion for leave to file such a petition, and both shall be printed.

**** This provision came into effect in 1954. See Sup. Ct. R. 31.1 (1954).

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No. 96-8986

In the Supreme Court of the United States

OCTOBER TERM, 1997

ARNOLD F. HOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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22 pp

TABLE OF AUTHORITIES

Cases:	Page
Adams v. *United States ex rel. McCann*, 317 U.S. 269 (1942)	9
American Hospital Ass'n v. *NLRB*, 499 U.S. 606 (1991)	7
Burnet v. *Coronado Oil & Gas Co.*, 285 U.S. 393 (1932)	2
Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984)	3
Carlisle v. *United States*, 116 S. Ct. 1460 (1996)	14, 15
Chetwood, In re, 165 U.S. 443 (1897)	15-16
DeBeers Consolidated Mines, Ltd. v. *United States*, 325 U.S. 212 (1945)	9
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979)	7
Far East Conference v. *United States*, 342 U.S. 570 (1952)	9
Felker v. *Turpin*, 116 S. Ct. 2333 (1996)	7, 9, 18
Gustafson v. *Alloyd Co.*, 513 U.S. 561 (1995)	13
Heckler v. *Campbell*, 461 U.S. 458 (1983)	3
Holiday v. *Johnston*, 313 U.S. 342 (1941)	15
House v. *Mayo*, 324 U.S. 42 (1945)	1, 15, 17
Hubbard v. *United States*, 514 U.S. 695 (1995)	2
Hunter v. *United States*, 101 F.3d 1565 (11th Cir. 1996), cert. denied, 117 S. Ct. 1695 (1997)	10
LaBuy v. *Howes Leather Co.*, 352 U.S. 249 (1957)	12
Landgraf v. *USI Film Products*, 511 U.S. 244 (1994)	3
Layne & Bowler Corp. v. *Western Well Works, Inc.*, 261 U.S. 387 (1923)	10
Lindh v. *Murphy*, 117 S. Ct. 2059 (1997)	3

Cases—Continued: Page

Lyons v. *Ohio Adult Parole Auth.*, 105 F.3d 1063 (6th Cir.), cert. denied, 117 S. Ct. 1724 (1997) 10
McClellan v. *Carland*, 217 U.S. 268 (1910) 14, 15
Mirzan, Ex parte, 119 U.S. 584 (1887) 14
Neagle, In re, 135 U.S. 1 (1890) 5
Norris v. *Swope*, 72 S. Ct. 1020 (1952) 14
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 2
Pennsylvania Bureau of Correction v. *United States Marshals Service*, 474 U.S. 34 (1985) 14, 15
Peru, Ex parte, 318 U.S. 578 (1943) 7, 11
Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943) 12
Teague v. *Lane*, 489 U.S. 288 (1989) 10
U.S. Alkali Export Ass'n v. *United States*, 325 U.S. 196 (1945) 9
United States National Bank of Oregon v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993) 6
Whitney v. *Dick*, 202 U.S. 132 (1906) 15
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 3

Statutes and rules:

Act of Sept. 24, 1789, ch. 20, 1 Stat. 73:
§ 13, 1 Stat. 80-81 14
§ 14, 1 Stat. 81-82 13
Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 828 14
Act of Mar. 10, 1908, ch. 76, 35 Stat. 40 6
Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087:
§§ 117-121, 36 Stat. 1131-1132 7
§ 121, 36 Stat. 1132 8
Act of Feb. 13, 1925, ch. 229, § 6(d), 43 Stat. 940 ..... 6, 7, 8
Act of June 25, 1948, ch. 646, 62 Stat. 869:
§ 2242, 62 Stat. 965 (28 U.S.C. 2242 (1952)) 14
§ 2253, 62 Stat. 967 (28 U.S.C. 2253 (1952)) 7-8
All Writs Act, 28 U.S.C. 1651 1
28 U.S.C. 1651(a) 9

Statutes and rules—Continued: Page

Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 3
§ 102, 110 Stat. 1217, 28 U.S.C. 2253(c)(1) (Supp. II 1996) 12, 13
§ 106, 110 Stat. 1221, 28 U.S.C. 2244(b)(3)(D) (Supp. II 1996) 12, 13
Rev. Stat., Tit. XIII, ch. 6, § 605 (1874) 8
1 U.S.C. 204(a) 6
28 U.S.C. 217 (1940) 5, 8
28 U.S.C. 451 (1940) 9
28 U.S.C. 466 (1940) 5, 6, 8
28 U.S.C. 1254(1) 16
28 U.S.C. 2101(c) 17
28 U.S.C. 2243 15
28 U.S.C. 2255 ..... 3, 9, 11, 16
Sup. Ct. R. 20.1 11
Fed. R. Crim. P. 29(c) 14, 15

Miscellaneous:

H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947) 8
D. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153 10

In the Supreme Court of the United States

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No. 96-8986

ARNOLD F. HOHN, PETITIONER

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

All of the participants in this case agree that, in *House* v. *Mayo*, 324 U.S. 42 (1945) (per curiam), this Court held that it lacked statutory certiorari jurisdiction to review the refusal by a court of appeals to issue a certificate of probable cause but that the Court could nonetheless issue a common-law writ of certiorari under the All Writs Act, 28 U.S.C. 1651. U.S. Br. 21; Pet. Br. 13-15; Court-Appointed Amicus Curiae Br. (Amicus) 21, 35-36. In our view, the holding in *House* controls this case. There is no meaningful distinction between the Court's power at the time of *House* to review the decision of a court of appeals denying a certificate of probable cause and its power

today to review the decision of a court of appeals denying a certificate of appealability.

1. a. Petitioner requests (Pet. Br. 9) that this Court disregard *stare decisis* and overrule *House*'s holding that the Court lacks statutory certiorari jurisdiction on the grounds that the holding is incorrect and "appears to have been renounced by this Court in subsequent decisions." The basic premise of *stare decisis*, however, is that a prior decision is not to be disregarded merely because the Court now believes that it was wrongly decided. "[I]t is more important that the applicable rule of law be settled than that it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). "Who ignores [*stare decisis*] must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)." *Hubbard* v. *United States*, 514 U.S. 695, 716 (1995) (Scalia, J., joined by Kennedy, J., concurring in part and concurring in the judgment). Respect for precedent has "special force in the area of statutory interpretation, for * * * Congress remains free to alter what [this Court] ha[s] done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989). Despite petitioner's contention that later cases "appear[] to have * * * renounced" *House*'s holding (Pet. Br. 9), the Court's opinions in those cases are silent on the jurisdictional question and therefore cannot be read to have overruled *House sub silentio*. See U.S. Br. 26.

b. Petitioner also raises two issues as insurance, in case the Court overrules the second component of the holding in *House* and rejects its power to review the decision of the court of appeals by common-law certiorari. Petitioner first contends (Pet. Br. 40-44)

that he does not in fact need a certificate of appealability in order to appeal the merits of his Section 2255 motion. That claim is not properly before the Court, because petitioner failed to raise the claim in the court of appeals or in his petition for certiorari, and because the claim is not fairly subsumed in the question on which the Court granted review. See *Heckler* v. *Campbell*, 461 U.S. 458, 468 n.12 (1983); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992).

Petitioner's claim lacks merit in any event. As we explained in our response to the petition for certiorari (at 10-12), petitioner's notice of appeal had not been filed at the time Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Therefore, *Lindh* v. *Murphy*, 117 S. Ct. 2059, 2063 (1997), does not control petitioner's case. Nor do the Court's precedents regarding retroactive application of statutes, see, *e.g.*, *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), prevent application to petitioner's appeal of the requirement that petitioner obtain a certificate of appealability. That requirement is a jurisdictional prerequisite to consideration of the merits of petitioner's Section 2255 motion by the court of appeals. See *id.* at 274 (noting that the Court has regularly applied statutes ousting jurisdiction to pending litigation). Moreover, petitioner's Section 2255 motion is a form of prospective relief. See *ibid.* (explaining that an individual does not have a "vested right" to relief that operates "*in futuro*"). The certificate requirement is purely procedural and regulates "secondary rather than primary conduct." *Id.* at 275 (opining that procedural requirements "may often

be applied in suits arising before their enactment without raising concerns about retroactivity"). Finally, because the district court had not ruled on petitioner's motion when the AEDPA was enacted, the requirement that petitioner obtain a certificate was in place well before the time at which petitioner was obliged to seek one. Application of the requirement to petitioner's appeal is therefore prospective, and raises no retroactivity concerns.

Petitioner's additional fall-back claim, that this Court should itself grant a certificate of appealability (Pet. Br. 44-49), is similarly not properly before the Court in the present case. Petitioner raised that claim as well for the first time in his merits brief, and it too is not subsumed in the question on which the Court granted review. Even were the issue properly before the Court, petitioner is not entitled to a certificate from this Court or a Justice of the Court, as we have explained in our response to the application for a certificate of appealability that petitioner submitted on January 21, 1998. See U.S. Mem. in Opp., No. A-527 (filed Jan. 29, 1998).

2. Like petitioner, amicus requests (Br. 35-36) that this Court disregard *stare decisis* and part of its holding in *House*. Unlike petitioner, however, amicus would have the Court jettison the part of *House*'s holding that made clear that the Court may use common-law certiorari under the All Writs Act to review a court of appeals' denial of a certificate authorizing appeal. Amicus offers three reasons for the Court to disregard *House*, none of which is persuasive.

a. First, amicus attempts to distinguish *House* by asserting (Br. 3-4, 13, 24, 35-37) that a Justice of this Court may issue a certificate authorizing appeal under current law but lacked that authority at the time *House* was decided. That assertion is incorrect. Moreover, even if it were correct, it would not deprive this Court of the power under the All Writs Act to review the decision of a court of appeals denying a certificate.

Amicus bases his assertion that a Justice of this Court could not have issued a certificate at the time *House* was decided on 28 U.S.C. 466 (1940). See Br. 36, A1. That Section provided:

> From a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a State court no appeal to the circuit court of appeals shall be allowed unless the United States court by which the final decision was rendered or a judge of the circuit court of appeals shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or judge shall certify that there is probable cause for such allowance.

28 U.S.C. 466 (1940). The 1940 Code, however, used the term "judge of the circuit court of appeals" to include the Justice of this Court allotted to that circuit. See 28 U.S.C. 217 (1940) ("The words 'circuit justice' and 'justice of a circuit' shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word 'judge', when applied generally to any circuit, shall be understood to include such justice."). See also *In re Neagle*, 135 U.S. 1, 54 (1890) (Justices of this Court "are also judges of the Circuit Courts of the United States."). Thus, the distinction that amicus would find between

the circumstances of this case and *House* simply does not exist.

The power of a circuit justice at the time *House* was decided to issue a certificate is confirmed by review of Section 6(d) of the Act of February 13, 1925, ch. 229, 43 Stat. 940, the statute on which the codifiers based the language of Section 466. That Section of the United States Code was not enacted into positive law, so it is only "prima facie" evidence of the law, which must be determined by reference to the language of the statute that Congress actually passed. See *United States National Bank of Oregon* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 448 (1993); see also 1 U.S.C. 204(a).

The Act, which changed the law to provide that appeals from habeas corpus cases would go to the circuit courts of appeals rather than to the Supreme Court, stated, in relevant part, that "the provisions of an Act entitled 'An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings,' approved March 10, 1908, shall apply to appellate proceedings [in the circuit courts of appeal] as they heretofore have applied to direct appeals to the Supreme Court." Act of Feb. 13, 1925, ch. 229, § 6(d), 3 Stat. 940. The Act of March 10, 1908, ch. 76, 35 Stat. 40, in turn, provided:

> That from a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a State court no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance.

Section 6(d) clearly intended to make a certificate of probable cause a prerequisite to appeal to the circuit courts of appeals, but its intent to deprive a Justice of this Court of the ability to issue a certificate is far from clear. Tellingly, we could find nothing in the legislative history of the 1925 Act, which included an extensive list of the intended changes to existing law, to suggest that Congress meant for Section 6(d) to divest a Justice of the pre-existing power to grant a certificate. See *American Hospital Ass'n* v. *NLRB*, 499 U.S. 606, 613-614 (1991); *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979); *Ex parte Peru*, 318 U.S. 578, 585 n. 4 (1943) (finding it "hardly conceivable" that the legislative history of the 1925 Act would lack any indication of an intent to limit this Court's jurisdiction to issue extraordinary writs if the Act did so). Repeals of jurisdiction by implication are not favored. See *Felker* v. *Turpin*, 116 S. Ct. 2333, 2338-2339 (1996). Because Supreme Court Justices were also members of the Circuit Courts of Appeals when Section 6(d) was enacted, see Act of March 3, 1911, ch. 231, §§ 117-121, 36 Stat. 1131-1132, the best reading of Section 6(d) is that *all* circuit judges, including the circuit justice, had the power to issue a certificate. Indeed, Congress confirmed that interpretation when it enacted Title 28 of the United States Code into positive law and explicitly provided that a "circuit justice or judge" could issue a certificate. See Act of

June 25, 1948, ch. 646, § 2253, 62 Stat. 967 (codified at 28 U.S.C. 2253 (1952)).[1]

Even if it were true that a Justice of this Court can issue a certificate of appealability under current law but could not issue one when *House* was decided, there would be no reason to disregard the holding in *House*. Amicus contends (Br. 12-13, 19-20, 30-31, 35-37) that the power to issue a certificate makes using a common-law writ neither "necessary" nor "appropriate," because granting the certificate directly is an "alternative" remedy. Amicus ignores, however, that

[1] The House Committee Report accompanying the 1948 Act does not indicate that the relevant Section of the Act made any substantive change but states rather that "[c]hanges were made in phraseology." H.R. Rep. No. 308, 80th Cong., 1st Sess. A180 (1947). We acknowledge that the proper interpretation of 28 U.S.C. 217 (1940), which clarifies the meaning of the term "judge of the circuit court of appeals" in 28 U.S.C. 466 (1940), is not free from all doubt. Section 217 of the Code is based on Section 121 of the Act of March 3, 1911, ch. 231, 36 Stat. 1132. The statutory provision is identical to the code provision except that the statutory provision contains the phrase "when used in this title" after "justice of a circuit." That phrase suggests that the provision was designed to clarify the terminology used in the "title" of which it was a part. Because neither Section 6(d) of the 1925 Act nor 28 U.S.C. 466 (1940) existed in 1911, it is unclear whether they should be considered encompassed in the same "title" as Section 121 of the 1911 Act. Clarification is provided, however, by the fact that Section 121 of the 1911 Act reproduced verbatim Section 605 of the Revised Statutes. Title XIII of the Revised Statutes contained all the laws of the United States related to the judiciary, including Section 605 and those Sections governing habeas corpus. See Rev. Stat., Tit. XIII, ch. 6 (1874). Thus, it is reasonable to conclude that Congress intended "judge of the circuit court of appeals" to include the "circuit justice" in all laws related to the judiciary, including those governing habeas corpus.

another "alternative" remedy—an original petition in this Court for habeas corpus—indisputably existed at the time this Court decided *House*. See 28 U.S.C. 451 (1940). As we have explained (U.S. Br. 31-34), the existence of some other means by which the Court could "physically discharge its appellate duties," *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273 (1942), does not prevent use of an extraordinary writ. See, *e.g.*, *U.S. Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 204 (1945) (using common-law certiorari to review interlocutory order even though final judgment was subject to review on appeal); *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945) (same with respect to preliminary injunction); *Far East Conference* v. *United States*, 342 U.S. 570, 572 (1952) (same with respect to denial of motion to dismiss); *Felker*, 116 S. Ct. at 2341 (Stevens, J., joined by Souter & Breyer, JJ., concurring) (explaining that the Court has jurisdiction both to consider an original petition for habeas corpus and to review, pursuant to the All Writs Act, an order denying a prisoner the right to file a successive habeas petition).

Use of a common-law writ in this case is "reasonably necessary in the interest of justice," *Adams*, 317 U.S. at 274, and "appropriate," 28 U.S.C. 1651(a). Reliance on an application for a certificate of appealability or an original petition for habeas corpus would be an unduly cumbersome way for this Court to preserve the potential to review the merits of petitioner's Section 2255 motion or to supervise the interpretation by the courts of appeals of the standard for issuing certificates. The Court can use common-law certiorari to consider only those specific and discrete legal issues of public importance that it

believes warrant its attention. Cf. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (explaining that Court should confine its attention to issues of broad public importance). Passing on an application for a certificate or granting an original habeas petition, in contrast, would require the Court to review the entire case, to determine the appropriate legal standards, and to apply the applicable legal standards to the facts of the case. In addition, the decision whether to issue a certificate or grant a petition for habeas corpus requires detailed consideration of the particular facts of the case, a task more easily and more appropriately performed by a court or judge closer to the record. See *Lyons* v. *Ohio Adult Parole Auth.*, 105 F.3d 1063, 1072 (6th Cir.), cert. denied, 117 S. Ct. 1724 (1997); *Hunter* v. *United States*, 101 F.3d 1565, 1580-1581 (11th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 1695 (1997); D. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153, 192-194 (identifying difficulty in resolving factual issues as a reason for this Court's reluctance to consider original petitions for habeas corpus). Thus, common-law certiorari would be a more focused and efficient use of the Court's resources than the highly case-specific alternatives that might be invoked.[2] See U.S. Br. 32-34.

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[2] The response to petitioner's application for a certificate of appealability that amicus has requested leave to file underscores the potential of the certificate process to consume this Court's resources. Amicus suggests that the Court would have to canvas a wide range of laws and precedents to decide whether petitioner's claims are constitutional in nature (Resp. 1-7); that the Court would have to venture into the thickets of analysis under *Teague* v. *Lane*, 489 U.S. 288 (1989), to decide whether any claim that is constitutional is a new rule that may not be raised in a proceeding under Section 2255 (a task amicus would have this Court shoulder even though the United States has not raised *Teague*) (Resp. 7-8); and that the Court would have to raise and resolve a similar myriad of issues at the behest of *any* petitioner in *any* application, because no petitioner "must demonstrate 'exceptional circumstances' before being eligible to obtain a certificate of appealability from the Supreme Court under 28 U.S.C. 2253" (Resp. 1). Amicus's sanguine view that an application for a certificate could be resolved in "days or at most weeks" (Br. 19) must be assessed with a skeptical eye given his assertion that this Court *must* pass on all the legal and factual issues, large and small, that turn up in an application, without even the discretion to demand "exceptional circumstances" before making that use of this Court's scarce resources. In contrast, our suggestion that the Court vacate the judgment and remand for further consideration would enable the court of appeals in the first instance to pass on the legal issues presented in light of the government's current position. That court's additional consideration of this case may obviate any further need for this Court to intervene.

Finally, in some instances, application to a Justice of this Court for a certificate would not enable the Court, even through that more burdensome route, to correct error by a court of appeals. For example, in a case in which a court of appeals requires a certificate even though the statute does not require one, this Court would not have jurisdiction to entertain an application for a certificate and would therefore be unable to redress the error of the court of appeals.[3]

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[3] Amicus also relies (Br. 20, 31) on Supreme Court Rule 20.1, which requires a demonstration that "adequate relief cannot be obtained in any other form." That rule, however, is not jurisdictional and is therefore not relevant to the question presented in this case, as even the cases cited (Br. 33-34) by amicus demonstrate. See, *e.g.*, *Ex parte Peru*, 318 U.S. at 584 (explaining that "common law writs * * * are *usually* denied

b. The second reason proffered by amicus (Br. 12-13, 19-20, 30-38) for this Court to depart from *House* is that its holding is inconsistent with cases and principles delimiting the Court's power under the All Writs Act. Amicus repeatedly contends (Br. 13, 20, 32-34) that a common-law writ of certiorari is unavailable because "'express statutory provision[s]' * * * prohibit jurisdiction." Amicus, however, fails to identify those provisions.

Nowhere in the statutes at issue in this case did Congress expressly or by implication preclude this Court from using common-law certiorari to review the decision of a court of appeals denying a certificate of appealability. That limitation cannot be inferred from 28 U.S.C. 2253(c)(1) (Supp. II 1996), which limits "appeal * * * to the court of appeals" from the "final order in a proceeding under section 2255." Section 2253(c)(1) says nothing about certiorari, nothing about review by the Supreme Court, and nothing about review of a decision on an application for a certificate of appealability. In stark contrast, 28 U.S.C. 2244(b)(3)(D) (Supp. II 1996) expressly provides that certiorari is not available to review the denial by

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where other adequate remedy is available") (emphasis added); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25-26 (1943) (explaining that the issue whether mandamus may be used "as a substitute for the appeal procedure prescribed by statute" is not a question of the "power to grant the writ" but whether "exercise of that power" is "appropriate"). See also *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 254-255 (1957) (noting a court's power to grant mandamus even though the court would have appellate review over the case later in the process). In any event, the available alternatives are not adequate for the reasons described above.

a court of appeals of a motion to file a successive petition.[4]

Nor can any limitation be inferred from the authorization in Section 2253(c)(1) for a circuit justice to grant a certificate. Amicus suggests (Br. 26) that Congress intended that authorization to serve as the exclusive means for a prisoner to seek review of the denial by a court of appeals of the prisoner's request for a certificate. The language of Section 2253(c)(1), however, does not support amicus's suggestion. The Section does not provide that a prisoner should seek a certificate first from a circuit judge, and then, if the circuit judge denies the certificate, from a Justice of this Court. The Section simply provides that either a "circuit justice or judge" may issue a certificate, without characterizing the action of the circuit justice as review of the action of a lower court denying a certificate. Congress has similarly long provided that a prisoner may file an original petition for habeas corpus in this Court. See Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82. This Court has never suggested, however, that its power to consider an original petition displaces its power to review the judgment of a court of appeals on a petition that is not filed in the first instance in this Court.[5]

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[4] The contention of amicus (Br. 26) that Section 2244(b)(3)(D) simply represents "a double, as opposed to a single, statutory knot precluding certiorari review" turns statutory construction on its head. Rather than assume Congress has included unnecessary language to emphasize a point, "the Court will avoid a reading which renders some words altogether redundant." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995).

[5] To the contrary, the failure first to seek appellate review of the denial of a petition for habeas corpus filed in the lower

Finally, amicus cannot contend that the mere existence of statutory certiorari prevents this Court from issuing a common-law writ of certiorari under the All Writs Act. The two sources of certiorari jurisdiction have coexisted for more than a century. See Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 828 (creating statutory writ of certiorari); Act of Sept. 24, 1789, ch. 20, §§ 13, 14, 1 Stat. 80-81 (enacting original All Writs Act). This Court has never suggested that Congress's decision to create a new statutory writ of certiorari effectively repealed the Court's authority under the All Writs Act to issue the common-law writ. To the contrary, in *McClellan* v. *Carland*, 217 U.S. 268 (1910), the Court specifically held that it could grant a common-law writ of certiorari under the All Writs Act even though it could not grant certiorari under the statutory certiorari provisions enacted in 1891. *Id.* at 277-280.[6]

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courts is a reason to deny an original petition in this Court. See *Norris* v. *Swope*, 72 S. Ct. 1020, 1021 (1952) (Douglas, J., in chambers). The requirement that a prisoner exhaust the possibility of relief from the district courts and courts of appeals before filing an original petition for habeas corpus in this Court was established by case law as early as 1887, see, *e.g.*, *Ex parte Mirzan*, 119 U.S. 584, 586 (1887), and was later codified by the Act of June 25, 1948, ch. 646, § 2242, 62 Stat. 965.

[6] Because no statutory provision "specifically addresses the particular issue at hand," *Carlisle* v. *United States*, 116 S. Ct. 1460, 1467 (1996), neither *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U.S. 34 (1985), nor *Carlisle* can bear the weight that amicus would put on them (Br. 30-33). *Carlisle* involved Federal Rule of Criminal Procedure 29(c), which expressly requires that a motion for acquittal be filed within seven days after the jury is discharged. The Court simply held that the All Writs Act does not provide authority for a district judge to grant a motion for

Cases such as *McClellan* also dispose of amicus's contention (Br. 12, 19-20, 37-38) that a common-law writ of certiorari is not "in aid" of this Court's appellate jurisdiction. Amicus suggests (Br. 37) that an extraordinary writ can never be in aid of the Court's jurisdiction unless the Court has other "existing appellate authority." The Court, however, has frequently used the common-law writ of certiorari to bring before it appeals when it lacks other appellate authority. See *McClellan*, 217 U.S. at 280 (holding that an extraordinary writ "may issue in aid of the appellate jurisdiction which otherwise might be defeated by the unauthorized action of the court below"). See also *House*, *supra*; *Holiday* v. *Johnston*, 313 U.S. 342, 348 n.2 (1941); *Whitney* v. *Dick*, 202 U.S. 132, 135 (1906); *In re Chetwood*, 165 U.S. 443, 462

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acquittal filed on the eighth day after discharge on the theory that the order granting the motion is tantamount to a writ of coram nobis. 116 S. Ct. at 1467. The Court first noted that the defendant did not ask for that writ, the district court did not purport to issue the writ, and the writ has not traditionally been available to order an acquittal for insufficient evidence. *Ibid.* The Court added, as additional support for its conclusion, that the writ could not in any event be used to evade the time limits expressly set by Rule 29(c) for granting a motion for acquittal. 116 S. Ct. at 1467-1468. In *United States Marshals*, a magistrate issued a writ of habeas corpus *ad testificandum* to compel the United States Marshals Service to bring five witnesses in state custody to the federal courthouse. 474 U.S. at 35. The Court held that, under 28 U.S.C. 2243, the writ could not be directed to the Marshals because they did not have custody over the prisoners. 474 U.S. at 38-39. The Court also dismissed an argument that the magistrate's order was authorized under the All Writs Act, because the All Writs Act does not authorize the issuance of writs, such as the writ of habeas corpus *ad testificandum*, that are otherwise "specifically provided for by statute." *Id.* at 41-43.

(1897). In this case, if the court of appeals had issued a certificate, this Court would have had jurisdiction to review the merits of petitioner's Section 2255 motion under 28 U.S.C. 1254(1). That is all the appellate authority necessary to empower the Court to issue a writ under the All Writs Act.

c. The final reason proffered by amicus (Br. 18-19) for disregarding *House* is that allowing review by certiorari of the denial of an application for a certificate would result in an unworkable "two-track system of appellate review." The possibility of two tracks of review arises because a court of appeals may deny a certificate as to one or more issues raised by a prisoner but grant a certificate as to one or more other issues. As amicus acknowledges (*id.* at 38-39), however, "policy considerations" are "best addressed to members of Congress."

In any event, the policy concerns expressed by amicus are not affected by the outcome of the question presented in this case. The potential for two tracks of appellate review exists whether a prisoner seeks review of the denial by a court of appeals of a certificate by petitioning for certiorari or by filing an application for a certificate with a Justice of this Court. Amicus suggests (Br. 19) that two-track review will present less of a problem if this Court's review is limited to an application for a certificate, because individual Justices historically have disposed of applications more speedily than the Court has disposed of cases on certiorari. Historical experience with other applications, however, is not necessarily a good guide. As discussed at pages 9-10 & note 2, *supra*, deciding an application for a certificate could require a Justice or the Court to pass on a wide range of issues. As in this case, an application could require

resolution of more legal and factual issues than the Court would address if it limited review to important legal issues through the certiorari process.[7] Thus, it is speculative whether applications for certificates will be resolved more quickly than petitions for certiorari. Indeed, because certificates of appealability may be filed at any time, using them rather than common-law writs of certiorari may actually result in more disruption of the appellate process. Compare 28 U.S.C. 2101(c) (any petition for certiorari must be filed within 90 days after the entry of the judgment of which review is sought unless the time is extended for good cause). In any event, the Court could avoid the two-track review problem by deciding that it will ordinarily deny certiorari when a court of appeals has granted authorization to appeal some issues but not others. The Court could instead consider whether to review the entire case after the court of appeals has passed on those issues for which it authorized appeal.

3. This case is easily resolved if the Court declines the requests of both petitioner and amicus to depart from precedent and instead adheres to its holding in *House* v. *Mayo*, *supra*. That resolution is supported by *stare decisis* and consistent with the plain language of the statutory provisions involved in this case, the other precedents of this Court, and the principle that repeal of this Court's jurisdiction by implication is not favored, see *Felker*, 116 S. Ct. at 2338.

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[7] For example, as we explained in our motion in opposition to the application for a certificate of appealability filed by petitioner (U.S. Mem. in Opp. 6), the Court would have to decide whether petitioner has made a substantial showing that he can excuse his procedural default—either because he can show cause and prejudice or because he is actually innocent.

* * * * *

For the foregoing reasons, and those stated in our opening brief, this Court has jurisdiction under the All Writs Act to grant the petition for certiorari, vacate the judgment of the court of appeals, and remand for further consideration.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

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In the Supreme Court of the United States

OCTOBER TERM, 1997

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

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25 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. SECTION 2253 DOES NOT STRIP THIS COURT OF CERTIORARI JURISDICTION 1

A. The "Plain Terms" of Section 2253 Do Not Mention, Let Alone Proscribe, This Court's Certiorari Jurisdiction 1

B. Amicus's Efforts To Explain Away The Contrast Between Sections 2253 And 2244 Are Unsuccessful 3

C. There Is No Basis For "Implying" A Ban On Certiorari 4

1. A Ban Cannot Be Inferred From The Mere Existence Of An Alternative Remedy 4

2. A Ban Cannot Be Inferred From The Purposes Of The AEDPA 7

3. Certiorari Jurisdiction Will Not Produce The Practical Difficulties Feared By Amicus 8

II. SECTION 1254(1) CONFERS JURISDICTION TO REVIEW DENIALS OF LEAVE TO APPEAL 8

III. THE ALL WRITS ACT CONFERS JURISDICTION TO REVIEW DENIALS OF LEAVE TO APPEAL 12

IV. THE ARGUMENT THAT SECTION 2253 POSES NO BAR TO JURISDICTION IN THIS CASE IS DIRECTLY RESPONSIVE TO THE QUESTION PRESENTED 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Alkali Export Ass'n v. *United States*, 325 U.S. 196 (1945) 13, 14, 15

Babbitt v. *Sweet Home Chapter of Communities For a Great Oregon*, 515 U.S. 687 (1995) 3

Blonder-Tongue Labs, Inc. v. *University of Illinois Found.*, 402 U.S. 313 (1971) 17

Blodgett v. *Campbell*, 508 U.S. 1301 (1993) 6

Carlisle v. *United States*, 116 S. Ct. 1460 (1996) 14

Cuyler v. *Sullivan*, 446 U.S. 335 (1980) 17

Davis v. *Jacobs*, 454 U.S. 911 (1981) 4, 13-14, 18

DeBeers Consol. Mines, Ltd. v. *United States*, 325 U.S. 212 (1945) 13

Dunn v. *Commodity Futures Trading Comm'n*, 117 S. Ct. 913 (1997) 3

Felker v. *Turpin*, 116 S. Ct. 2333 (1996) 2, 4

Ferguson v. *District of Columbia*, 270 U.S. 633 (1926) 9

Garrison v. *Patterson*, 391 U.S. 464 (1968) 9

House v. *Mayo*, 324 U.S. 42 (1945) . . . . . *passim*

Hunter v. *United States*, 101 F.3d 1565 (11th Cir. 1996) (en banc) 18

In re 620 Church Street Bldg. Corp., 299 U.S. 24 (1936) 9

In re Burwell, 350 U.S. 521 (1956) 9

TABLE OF AUTHORITIES — Continued

Page(s)

Jeffries v. *Barksdale*, 453 U.S. 914 (1981) 4

Kimble v. *Swackhammer*, 439 U.S. 1385 (1978) 6

Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 18

Lindh v. *Murphy*, 117 S. Ct. 2059 (1997) 17, 18

Lozada v. *United States*, 107 F.3d 1011 (2d Cir. 1997) 18

Lyons v. *Ohio Adult Parole Auth.*, 105 F.3d 1063 (6th Cir. 1997) 18

Nixon v. *Fitzgerald*, 457 U.S. 731 (1982) 9, 10, 11

Northeast Bancorp, Inc. v. *Board of Governors*, 472 U.S. 159 (1985) 17

Payne v. *Tennessee*, 501 U.S. 808 (1991) 9

Pennsylvania Bureau of Correction v. *United States Marshals*, 474 U.S. 34 (1985) 12, 14

Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943) 13

Santana v. *United States*, 98 F.3d 752 (3d Cir. 1996) 18

Smith v. *Allwright*, 321 U.S. 649 (1944) 9

Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984) 17

United States v. *Gaudin*, 515 U.S. 506 (1995) 9

United States v. *New York Tel. Co.*, 434 U.S. 159 (1977) 15

United States v. *Nixon*, 418 U.S. 683 (1974) 11

United States v. *Orozco*, 103 F.3d 389 (5th Cir. 1996) 18

TABLE OF AUTHORITIES — Continued

Page(s)

United States v. *Riddick*, 104 F.3d 1239 (10th Cir. 1997) 18

United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 17

Yee v. *City of Escondido*, 503 U.S. 519 (1992) 17

Statutes, Rules and Regulations

28 U.S.C. § 217 16

28 U.S.C. § 451 13

28 U.S.C. § 466 16

28 U.S.C. § 1254(1) ..... *passim*

28 U.S.C. § 1292(b) 12

28 U.S.C. § 1651 ..... 1, 12, 15

28 U.S.C. § 2241 5

28 U.S.C. § 2243 15

28 U.S.C. § 2244 ..... 2, 3, 4, 5

28 U.S.C. § 2253 ..... *passim*

FED. R. APP. P. 22(b) 16

Supreme Court Rule 10 6

Supreme Court Rule 14.1 6

Supreme Court Rule 20 13

Supreme Court Rule 22 6

Supreme Court Rule 22.5 6

TABLE OF AUTHORITIES — Continued

Page(s)

Other

141 CONG. REC. S7841 (daily ed. May 25, 1995) 7

BLACK'S LAW DICTIONARY (1891) 9

BLACK'S LAW DICTIONARY (6th ed. 1991) 9, 16

Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 623 Before the Sen. Comm. on the Judiciary, 104th Cong. (Mar. 28, 1995) 7

H.R. REP. NO. 80-308 (1947) 13, 16

H.R. REP. NO. 104-23 (1995) 7

Hearing on S.623 Before the Sen. Comm. on the Judiciary, 104th Cong. 3 (Mar. 28, 1995) 7

R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE (7th ed. 1993) 8

REPLY BRIEF FOR PETITIONER

Confronted with three statutes whose language can only plausibly be read to confer jurisdiction on the Court, amicus makes a valiant effort to pretend that their "[p]lain [t]erms" (Am. Br. 15) actually preclude jurisdiction. But the broad terms of 28 U.S.C. §§ 1254(1) and 1651 unmistakably grant this Court power to review all judicial proceedings in the courts of appeals and to enter all appropriate orders to protect its own appellate jurisdiction; and 28 U.S.C. § 2253 by its clear terms restricts only "appeal[s] * * * *to the court of appeals*," not certiorari in this Court. Lacking any persuasive argument grounded in the language of Section 2253, amicus urges this Court to "imply" restrictions on its certiorari jurisdiction for policy reasons and based on novel reconstructions of legislative history and precedents. As we show below, however, no justification exists for curtailing the generous discretionary certiorari power Congress has granted.

I. SECTION 2253 DOES NOT STRIP THIS COURT OF CERTIORARI JURISDICTION

Although amicus maintains that the statutory certiorari provision and the All Writs Act do not confer jurisdiction in this case, those arguments rest almost entirely on his claim that Section 2253 erects a statutory barrier. As we next explain, that argument defies the language, structure and purpose of Section 2253.

A. The "Plain Terms" of Section 2253 Do Not Mention, Let Alone Proscribe, This Court's Certiorari Jurisdiction

Repeatedly and emphatically in his brief, amicus describes Section 2253 as an "'express statutory provision[]'" (Am. Br. 13)[1] that by its "[p]lain" (*id.* at 15), "unmistakabl[e]" (*id.* at 11), "unbending" (*id.* at 16), "unequivocal[]" (*ibid.*), and "unyielding" terms (*id.* at 11), "prohibit[s]" this Court's certiorari jurisdiction (*ibid.*). When the rhetoric is swept aside, however, one fact is clear: *no* language in that provision even obliquely alludes to, let alone "express[ly]" eliminates, this Court's certiorari power. Even the States that have filed in support of amicus are constrained to admit this point. States Br. 7 n.2 (conceding a "lack of specific language in section 2253 regarding [certiorari] jurisdiction").

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[1] "U.S. Br." refers to the Solicitor General's opening brief; "U.S. Reply" refers to the Solicitor General's reply brief; "Am. Br." refers to appointed counsel's brief; "Br." refers to Hohn's opening brief; and "States Br." refers to the several States' amicus brief.

Unable to detect in Section 2253 any language prohibiting certiorari review, amicus endeavors to insert some. He contends that Section 2253, which by its terms restricts access only to "appeal[s] * * * to the court of appeals," "erects a jurisdictional gate to *appellate review* of all failed habeas petitions." Am. Br. 16 (emphasis added). By substituting the broader term "appellate review" for the more limited statutory phrase "appeal * * * to the court of appeals," amicus strives to expand the certificate provision to foreclose review by writ of certiorari, which is an exercise of the Court's "appellate jurisdiction." See *Felker* v. *Turpin*, 116 S. Ct. 2333, 2342 n.1 (1996) (Souter, Stevens & Breyer, JJ., concurring).[2] But that sleight of hand is precluded by Congress's clear limitation of the certificate requirement to "an *appeal* * * * *to the court of appeals*." 28 U.S.C. § 2253(c) (emphasis added). While review on certiorari is an exercise of this Court's appellate jurisdiction, it is *not* "an *appeal* * * * *to the court of appeals*" — which is the only proceeding to which Section 2253 restricts access. By selecting those limiting words, Congress evinced its intent to leave this Court's certiorari jurisdiction intact.

That Congress's failure to refer to this Court's certiorari jurisdiction in Section 2253 signifies its intent to retain certiorari jurisdiction is confirmed by an examination of other statutory language in the AEDPA. As we have explained (Br. 35-36), Congress proscribed such jurisdiction explicitly in Section 2244(b)(3)(E):

> [t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable *and shall not be the subject of a petition* for rehearing or *for a writ of certiorari.*

28 U.S.C. § 2244(b)(3)(E) (emphasis added). The highlighted language, which has no counterpart in Section 2253, demonstrates both (1) that Congress says so explicitly when it wishes to preclude this Court's review on certiorari, and (2) that Congress was aware that a restriction on "appeals" alone is insufficient to rescind the certiorari jurisdiction this Court otherwise has to review decisions disallowing appeals.

[2] Amicus similarly seems to ascribe (at 17, 24) great significance to Congress's use of the term "certificate of *appealability*." But the term "appealability" cannot reasonably be interpreted to encompass this Court's review on a writ of certiorari, which is not an appeal.

B. Amicus's Efforts To Explain Away The Contrast Between Sections 2253 And 2244 Are Unsuccessful

Amicus wisely concedes (at 26) that Congress's different treatment of the gatekeeping decisions in Sections 2244 and 2253 was intentional. Unwilling to accept that the different terms mean exactly what they say (*i.e.*, that there is a jurisdictional bar to certiorari only in Section 2244 and not in Section 2253), however, amicus proffers (at 26) the contra-textual "double-knot" theory to justify reading the different terms to mean the same thing. The "double-knot" theory is that Congress prohibited this Court's certiorari review of gatekeeping decisions in Section 2244 merely *to emphasize* what Congress understood was the rule even without an express prohibition — that certiorari review of gatekeeping decisions is never available. In contrast, amicus contends (at 26 (emphasis added)), "Congress had little reason to worry about *confirming* that certiorari was precluded" over Section 2253 gatekeeping decisions because "*House* [v. *Mayo*, 324 U.S. 42 (1945) had] already establish[ed] the point."

The "double-knot" theory amounts to little more than a plea to this Court to interpret Section 2244(b)(3)(E) of the AEDPA as unnecessary surplusage. That argument contravenes the established principle of statutory construction that statutes should not be read to render provisions superfluous. See, *e.g.*, *Dunn* v. *CFTC*, 117 S. Ct. 913, 917 (1997); *Babbitt* v. *Sweet Home Chapter*, 515 U.S. 687, 698 (1995).[3] Amicus's theory also rests on a distortion of the holding in *House*. Although *House* held that statutory certiorari is unavailable, it also held that common-law certiorari jurisdiction to review gatekeeping decisions *is* available. See *House*, 324 U.S. at 44-45. Amicus's assertion (at 26) that "*House* [had] already establish[ed] the point" that "certiorari was precluded" therefore tells only half the story.

Finally, Congress amended Sections 2244 and 2253 in 1996 against the background of not only *House*, but also a half-century of this Court's consistent practice of granting writs of certiorari to review denials of

[3] Amicus's attempt (at 26) to justify the superfluity his interpretation of the AEDPA would create falls flat: while it is true that Section 2244 contains "a hurdle to any district court consideration at all," Section 2253 similarly contains "a hurdle to any" *court of appeals* "consideration at all." The difference in forum simply has no bearing on whether there is a need for a clear statement in both contexts to prohibit certiorari jurisdiction over the court of appeals' gatekeeping decision.

leave to appeal. U.S. Br. 24 nn. 13-14 (collecting examples). Although during that half century two dissents were filed arguing against certiorari jurisdiction (*Jeffries* v. *Barksdale*, 453 U.S. 914 (1981) (Rehnquist, J., Burger, C.J., & Powell, J., dissenting); *Davis* v. *Jacobs*, 454 U.S. 911, 916-919 (1981) (Rehnquist, J., Burger, C.J., & Powell, J., dissenting)), that hardly sufficed to give Congress "little reason to worry about confirming that certiorari was precluded" as amicus contends (at 26). Amicus's efforts to explain away the contrast between Sections 2253 and 2244 are thus unpersuasive.

C. There Is No Basis For "Implying" A Ban On Certiorari

Finding no support in the language of the AEDPA, amicus resorts to arguing that a ban on certiorari jurisdiction should be read into Section 2253 by implication. But the Court ought not reach those arguments because the language of Section 2253, which restricts only the right to take "an appeal * * * *to the court of appeals*," is clear. Even if Section 2253 were ambiguous, however, amicus's various reasons for inferring a prohibition against certiorari jurisdiction are unpersuasive, especially in view of the principle that "[r]epeals [of appellate jurisdiction] by implication are not favored." *Felker*, 116 S. Ct. at 2338.[4]

1. A Ban Cannot Be Inferred From The Mere Existence Of An Alternative Remedy

Amicus claims that "no rational explanation exists for" Congress's decision both to permit the Court to review "the court of appeals' certificate decision by certiorari" (at 18) and to authorize Justices of the Court to decide original applications for certificates of appealability.

[4] Amicus argues (at 14-15) that Article III vests Congress with power to eliminate the Court's certiorari jurisdiction over gatekeeping decisions. But petitioner has asserted (Br. 39-40 & n.30) only that the Court's practice of avoiding such constitutional questions is yet another reason to interpret Section 2253 consistently with its plain language. Three Justices recognized only last Term that the question whether the AEDPA exceeds Congress's Exceptions Clause power might arise if the courts of appeals "adopted divergent interpretations of the gatekeeper standard" and this Court were precluded from resolving the conflict. See *Felker*, 116 S. Ct. at 2342 (Souter, Stevens & Breyer, JJ., concurring). As we explain in our opening brief (at 30-31) and below at pp. 5-6, the ability of Circuit Justices to grant certificates is a wholly inadequate means of reviewing and resolving circuit conflicts regarding gatekeeping decisions.

Accordingly, he urges, the grant of power to the Justices to issue certificates necessarily implies a revocation of the power to issue writs of certiorari.

Amicus's argument that the creation of one avenue of relief implies the elimination of another rests on the erroneous premise that there is something questionable, or even unusual, about duplicative or overlapping remedies. In fact, Congress creates overlapping avenues for relief all the time, and has done so especially in the context of habeas corpus, which is itself a collateral remedy.[5] Amicus's argument also proves too much. If the creation of one avenue of relief implies the elimination of all others, then Congress's enactment of Section 2253 also must signify retraction of the Court's power to grant an original petition for habeas corpus. Yet amicus concedes (at 14) that Section 2253 does not accomplish that result. Why should Congress's silence in Section 2253 concerning this Court's jurisdiction be interpreted as a statutory bar to one jurisdictional venue (certiorari), but as acquiescence in another (habeas)? Amicus provides no answer, and there is none.

Far from being irrational or duplicative as amicus claims (at 18), Congress's decision to provide this Court a choice of two methods by which to correct courts of appeals' errors in denying certificates was perfectly sensible. The two methods are effective for different purposes. Certiorari review of certificate denials is an efficient means of correcting significant legal errors and ensuring intercircuit uniformity in the application of the Section 2253 standard. It permits the Court to target a narrow legal error of national importance, without troubling itself with subsidiary legal and factual questions. And certiorari may be the *only* means of addressing certain questions, such as the procedures courts of appeals employ in deciding applications and the applicability of the certificate requirement to particular classes of habeas petitioners — issues that cannot appropriately be raised in an application to this Court for a certificate. See Br. 30-31. In contrast, the power of Circuit Justices to issue certificates of appealability implicates a different function: to ensure that justice is done in individual cases. This tool is suitable in cases in which the court of appeals' error in denying a certificate is not

[5] See, *e.g.*, 28 U.S.C. § 2241(a) (authorizing "the Supreme Court, any justice thereof, the district courts, and any circuit judge" to issue writs of habeas corpus); *id.* at § 2244(b) (authorizing second and successive habeas corpus petitions in certain circumstances); *id.* at § 1254(1) (authorizing certiorari review of cases in the courts of appeals).

particularly worthy of the full Court's attention, and entitlement to the certificate is a straightforward matter that is appropriately decided by a single Justice.

The application process is ill suited, however, as a vehicle for identifying and resolving important questions of law and ensuring uniformity among the circuits, as amicus would have it. This is so notwithstanding a single Justice's ability to refer an application to the full Court. First, applications for certificates generally emphasize the individual applicant's entitlement to relief, rather than the existence of circuit conflicts or the national importance of the issues. Compare S. Ct. Rules 10, 14.1(h) with S. Ct. Rule 22. Thus, the application process deprives the reviewing Justice of litigants' assistance in identifying legal issues worthy of the full Court's attention.[6] Second, an application is a poor means of targeting a single legal error for correction, since it requires resolution of all the questions predicate to issuance of a certificate, including factual and legal questions that the court of appeals may not have considered. In sum, Congress's design of Section 2253, which empowers the Court to exercise its discretion whether to issue a writ of certiorari or a certificate to correct a court of appeals' erroneous denial of leave to appeal, was sensible.

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[6] If Congress had intended decisions on certificate applications to serve the same error-correction and circuit-conflict-resolving functions as certiorari writs, as amicus claims, it almost certainly would have conferred the power to make such decisions on the full Court rather than on "circuit justices." While individual Justices of course have the power to refer applications to the full Court, they are not required to do so. See S. Ct. R. 22.5. And it is highly doubtful that a single Circuit Justice has the power to vacate a binding legal opinion of a full panel of a court of appeals, such as the one issued by the court below in this case, denying a certificate of appealability. See *Kimble* v. *Swackhamer*, 439 U.S. 1385 (1978) (Rehnquist, J., in chambers) ("It scarcely requires reference to authority to conclude that a single Circuit Justice has no authority to 'summarily reverse' a judgment of the highest court of a State; a single Justice has authority only to grant interim relief in order to preserve the jurisdiction of the full Court to consider an applicant's claim on the merits."); *Blodgett* v. *Campbell*, 508 U.S. 1301, 1303 (1993) (O'Connor, J., in chambers) (observing that a Circuit Justice appears to lack the power to "vacat[e] or reverse[] a court of appeals' order, other than an order providing interim relief").

2. A Ban Cannot Be Inferred From The Purposes Of The AEDPA

Amicus purports (at 17) to identify in Section 2253 a "jurisdiction stripping and case ending" policy that demonstrates that Congress intended to bar certiorari review. He explains (*ibid.*) that the denial of a certificate "both terminates the federal courts' power to review the matter and the inmate's power to seek review of the district court decision elsewhere."

But the manifest purpose of Section 2253 is to eliminate *frivolous* appeals, not to "terminate" all habeas cases in which certificates are denied. Section 2253 is *neither* "jurisdiction stripping" *nor* "case ending"; and amicus's assertion that denial of a certificate "terminates * * * the inmate's power to seek review" is contradicted by the plain language of the provision. As amicus himself points out repeatedly (at 27, 31, 36-37), Section 2253 expressly authorizes members of this Court to grant a certificate of appealability after one has been denied by the court of appeals. If a certificate is granted, the petitioner's appeal proceeds. The case is not terminated, and no court's jurisdiction has been stripped. Amicus also admits (at 14) that Section 2253 "leaves open" a second "door" to this Court's review for original petitions for habeas corpus. The availability of these avenues of review notwithstanding the denial of a certificate demonstrates that, while Section 2253 reflects a policy of "terminating" *frivolous* appeals, it also reflects a policy of ensuring review of meritorious claims.[7]

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[7] The legislative history of the AEDPA is replete with evidence of Congress's intent that habeas petitioners receive one full, fair review of their meritorious claims, including a full right to appeal. See, *e.g.*, *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 623 Before the Sen. Comm. on the Judiciary*, 104th Cong. 3 (Mar. 28, 1995) (Statement of Sen. Hatch, Bill Co-Sponsor) (introducing "a bill that will guarantee prisoners one complete and fair course of collateral review in the Federal System"); 141 CONG. REC. S7481 (daily ed. May 25, 1995) (Statement of Sen. Hatch) ("There will be a full right of appeal all the way up the Federal courts, from Federal court to district court to the Supreme Court of the United States, and their rights will be protected."); H.R. REP. NO. 104-23, at 11 (1995) (noting that "the defendant would typically be accorded * * * review by the federal courts at the trial and appellate levels in federal habeas corpus proceedings, with a final opportunity to seek Supreme Court review at the end of the process").

3. Certiorari Jurisdiction Will Not Produce The Practical Difficulties Feared By Amicus

Next, amicus argues (at 18-19) that Congress could not have intended to tolerate this Court's continued exercise of certiorari jurisdiction because of the structural problem of "two-track * * * appellate review" that allegedly might ensue. According to amicus (at 18), it would be wasteful and disruptive if this Court had the power to issue a writ of certiorari to review a court of appeals' decision denying leave to appeal certain issues, in a case in which the court of appeals had granted a certificate of appealability as to other issues and those issues were being litigated below.

Amicus overlooks one indisputable fact: every one of the "administrative oddities" he posits *would occur (or not) to the same degree even if the Court lacked certiorari jurisdiction.* That is because an original application to the Supreme Court seeking a certificate on a denied issue presents precisely the same problem of two-track review. In fact, applications in this Court for certificates on denied issues present an even greater "problem of timing" (Am. Br. 18) than petitions for certiorari because, as amicus admits (at 40), "*[n]o* time restrictions curb [a petitioner's] authority to file" such an application.

In any event, should issue-splitting complications arise, the courts involved could take steps to ameliorate the problem. For example, this Court might choose to defer decision on timely petitions for certiorari until a decision is reached in the rest of the case. See R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE 244 (7th ed. 1993). Alternatively, courts of appeals might withhold judgment denying leave to appeal certain issues until they are able to dispose of the appealable issues on the merits. Cf. *Garrison* v. *Patterson*, 391 U.S. 464, 466 (1968) (courts of appeals may combine consideration of the certificate question with review of the merits).

II. SECTION 1254(1) CONFERS JURISDICTION TO REVIEW DENIALS OF LEAVE TO APPEAL

Amicus offers only a brief and unconvincing rejoinder to our detailed showing (Br. 11-26) that the plain language of Section 1254(1) confers certiorari jurisdiction in this case. The Solicitor General agrees (U.S. Br. 17-18), and amicus does not dispute (at 17), that an application for a certificate of appealability properly docketed in the circuit court of appeals is "*in* the court[] of appeals." They are wise to concede the point:

the application is "in" the court of appeals both in a physical sense — it is physically lodged and acted upon there (see 28 U.S.C. § 2253(c)) — and in the abstract sense that the court of appeals is jurisdictionally authorized to receive and decide it (see *ibid.*; *In re Burwell*, 350 U.S. 521 (1956); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982)).

Amicus instead suggests (at 17) that "it [is] awkward to think of" a certificate of appealability as being a "'case'" within the meaning of Section 1254(1). The sole explanation amicus provides for this perceived "awkward[ness]" is his unsupported assertion that "us[ing] the word 'case' in § 1254 to allow certiorari review of certificate applications asks too much of the operative words." *Ibid.* But we respectfully submit that the "operative words" are those comprising the definition of the word "case." As we have explained (Br. 18), "case" is and has always been, since enactment of the predecessor of Section 1254(1), defined broadly as "[a] general term" signifying "an action, cause, suit, or controversy, at law or in equity" (BLACK'S LAW DICTIONARY 175 (1891); BLACK'S LAW DICTIONARY 215 (6th ed. 1990)) — that is, "*any* proceeding judicial in its nature" (*ibid.* (emphasis added)). Surely there can be no debate that the "proceeding" below was "judicial in its nature"; nor indeed, does either amicus or the government contend otherwise. In short, there is nothing awkward about recognizing that the Eighth Circuit's extensive proceedings and decision below were part of a "case" in the court of appeals.

Faced with the generous grant of jurisdiction expressed in Section 1254, amicus turns instead to "[l]ongstanding [p]recedent" (Am. Br. 21) to buttress his argument against statutory certiorari jurisdiction. That precedent consists chiefly of this Court's two-sentence holding on statutory certiorari in *House* and the similarly cursory statements (*e.g.*, *Ferguson* v. *District of Columbia*, 270 U.S. 633 (1926) (per curiam); *In re 620 Church Street Bldg. Corp.*, 299 U.S. 24, 26 (1936)) upon which *House* was premised. The Solicitor General too, while suggesting that the language and logic of Section 1254(1), and many of this Court's more recent decisions, compel the conclusion that a decision to deny a certificate is a "case[] in the court of appeals" (U.S. Br. 16-21, 23-26), nevertheless laments (*id.* at 26) that *House* and stare decisis bar this Court from reaching that correct result.

But "'this Court has never felt constrained to follow precedent'" when "governing decisions are unworkable or are badly reasoned" (*Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith* v.

Allwright, 321 U.S. 649, 665 (1944))). And the principle of stare decisis is especially weak when the "underpinnings" of the decisions have been "eroded[] by subsequent decisions of this Court." *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995). The statutory certiorari decision of *House* meets each of these criteria warranting its disavowal. It is "badly reasoned": it simply assumes, without explanation, that because the *appeal* from the denial of habeas relief is not "in" the court of appeals unless and until a certificate is issued, the request for a certificate must not be either. But that is a position that not even the court-appointed amicus endorses in this case: none of the parties here disputes that an application for a certificate *is* "*in* the court of appeals." See Am. Br. 17 (acknowledging that "it might be argued that Mr. Hohn's *application* for a certificate came into the court of appeals") (emphasis in original); U.S. Br. 17-18. And the *House* Court made not the slightest mention of any of the textual and other arguments we have presented here.[8]

House's perfunctory reasoning also has been severely undermined by this Court's more recent — and more reasoned — decision in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982). In that case, the Court held that "[t]here can be no serious doubt" about its power under Section 1254(1) "to review a court of appeals' decision to dismiss for lack of jurisdiction." *Id.* at 743 & n.23.

A court of appeals' certificate decision declining to accept jurisdiction over an appeal under Section 2253 is, as the Solicitor General acknowledges (U.S. Br. 20), "functionally equivalent" to a decision dismissing an appeal for lack of jurisdiction, which this Court held in *Nixon* is reviewable on a statutory writ of certiorari. The Solicitor General weakly suggests (*ibid.*), however, that "a distinction * * * in form" between the two situations — the fact that in Section 2253 Congress "has established a two-stage procedure" formally severing the predicate jurisdictional decision from the appeal — "may justify" a different rule regarding reviewability. But it is difficult to see why. As

[8] The question of statutory certiorari jurisdiction was neither briefed nor argued in *House*. The Court decided the jurisdictional question on the basis of a petition for certiorari filed by House's mother, which merely invoked statutory certiorari as the basis for jurisdiction, with little relevant explication. No opposition to the petition was filed by the State of Florida. See Pet. for Cert. and Letter from Charles E. Cropley, Clerk of Supreme Court, to Hon. J. Tom Watson, Attorney General of Florida (Feb. 7, 1945).

the Solicitor General himself points out, the fact that a judicial proceeding in the court of appeals is completely severed from consideration of the "merits" has never disqualified that proceeding from the status of a "case" in the court of appeals or insulated it from this Court's statutory certiorari review. See U.S. Br. 18-20 (citing interlocutory review and mandamus cases); see also Br. 21-23. If anything, the fact that a certificate proceeding is required by statute to occur before and separate from the merits appeal *confirms* that it is an independent case in the court of appeals. In contrast, when the jurisdictional decision is *not* statutorily severed from the merits appeal, there may be an argument that the jurisdictional decision is somehow "with" the merits appeal, which has been statutorily barred from entering the court of appeals.

Amicus strives to diminish the significance of the *Nixon* cases by asserting that they "*merely* teach that the Court has power to assess its own jurisdiction." Am. Br. 28 (emphasis added). That is incorrect. *Nixon* v. *Fitzgerald* squarely held that this Court has *statutory certiorari* power to review a *court of appeals*' disavowal of jurisdiction. 457 U.S. at 743 & n.23. That decision is simply irreconcilable with the holding of *House* that a court of appeals' decision improperly declining jurisdiction is unreviewable on statutory writ of certiorari.[9] In addition, the *Nixon* cases held that this Court's statutory certiorari power extends to the *merits* of any appeal over which the court of appeals could properly have exercised its jurisdiction, regardless whether it chose to do so. *Nixon* v. *Fitzgerald*, 457 U.S. at 743 & n.23; *United States* v. *Nixon*, 418 U.S. 683, 690 (1974). Together, the *Nixon* cases establish that any legal issue over which the court of appeals *could* properly have exercised its jurisdiction — whether it is a predicate jurisdictional decision over which every court

[9] Amicus also attempts (at 27-28) to distinguish the *Nixon* cases on the ground that the final judgment rule at issue there reflects a congressional policy merely to regulate when an appeal is taken, while Section 2253 purportedly reflects a congressional policy to "terminat[e] [an appeal] altogether." Putting aside amicus's incorrect characterization of the purpose underlying Section 2253 (see pp. 6-7, *supra*), this is a distinction without a difference. Both the final judgment rule and Section 2253 require courts of appeals to decline jurisdiction over certain appeals. There is simply no reason that a jurisdictional decision interpreting the final judgment rule to mandate dismissal of an attempted appeal would be subject to this Court's review under Section 1254(1), while a jurisdictional decision interpreting Section 2253 to require the same thing would not.

of appeals always has jurisdiction or a merits appeal — is "in the court[] of appeals" and subject to this Court's statutory certiorari jurisdiction, notwithstanding any decision by the court of appeals to the contrary.

Finally, the *House* holding concerning statutory certiorari jurisdiction should be overruled because it creates an unnecessarily complex jurisdictional rule. *House* creates a senseless exception to the simple, straightforward rule that this Court has the power to review by statutory writ of certiorari *all* judicial proceedings in the courts of appeals. Indeed, if reaffirmed, the *House* holding would call into doubt the Court's statutory certiorari power to review a host of proceedings in the courts of appeals — such as proceedings on petitions for mandamus, stay applications and interlocutory appeals of single issues pursuant to 28 U.S.C. § 1292(b) — that, like proceedings on a certificate application, occur before and independent of a "merits" appeal.

III. THE ALL WRITS ACT CONFERS JURISDICTION TO REVIEW DENIALS OF LEAVE TO APPEAL

The expansive terms of the All Writs Act, authorizing the Court to issue a common-law writ of certiorari whenever it is "necessary or appropriate in aid of" its jurisdiction and "agreeable to the usages and principles of law" (28 U.S.C. § 1651), empower the Court to review the decision below. If the Court concludes that it lacks statutory certiorari jurisdiction, issuance of a common-law writ would be both reasonably "necessary" *and* "appropriate" to protect the Court's jurisdiction over the pretermitted appeal, to correct the error of the court below efficiently and directly, and to ensure uniformity among the circuits in applying Section 2253.

Stymied by the generous language of the All Writs Act, amicus endeavors to insert into the statute jurisdictional requirements that Congress has not adopted. First, he contends that the All Writs Act restricts availability of the writ solely to circumstances in which its issuance is "necessary." Am. Br. 5 (arguing that "the 'extraordinary writ' has always required at a minimum some form of necessity"); *id.* at 13, 31. But the plain language of the All Writs Act contradicts that reading. The Act authorizes the Court to issue a common-law writ whenever it is "necessary *or appropriate*" in aid of the Court's appellate jurisdiction,

using the terms in the disjunctive. 28 U.S.C. § 1651 (emphasis added).[10]

Relatedly, amicus urges (at 12-13, 19-20, 30-31, 35-37) that the writ is unavailable if the petitioner has any "alternative means" of obtaining relief. But the language of the statute includes no such restriction on the Court's power, and the Court accordingly often issues common-law certiorari writs notwithstanding the existence of alternative remedies. In *Alkali* and *DeBeers*, for example, the Court issued common-law writs of certiorari to review an interlocutory order and a preliminary injunction, respectively, despite the possibility of (and legislatively expressed preference for) review of a final judgment. The availability of the remedy of an original petition in this Court for habeas corpus (see 28 U.S.C. § 451 (1940)) similarly failed to deter the Court from holding that

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[10] *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U.S. 34 (1985), is not to the contrary. There, the Court held only that the mere fact that issuance of a writ would be "appropriate" in aid of the Court's jurisdiction is insufficient; it must also be true that the writ does not contravene an express legislative directive to preclude the exercise of jurisdiction under the All Writs Act. See *id.* at 41-43.

Indeed, the Court interpreted its All Writs Act power as authorizing it to grant writs that were merely "appropriate," rather than necessary, even before the word "appropriate" appeared in the Act. As the Solicitor General explains (U.S. Br. 32 n.21), Congress added the words "*or appropriate*" to the All Writs Act in 1948 to codify the Court's broad interpretation of its common-law certiorari power in *Alkali Export Ass'n* v. *United States*, 325 U.S. 196 (1945), and *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945). See H.R. REP. NO. 80-308, at A145 (1947). In each of those cases, the Court had held that the All Writs Act empowered it to issue a writ notwithstanding both the availability of, and Congress's strong legislatively expressed preference for, another method of Supreme Court review (appeal from a final judgment). The Court explained in each case that issuance of the writ was "*appropriate*" notwithstanding the existence of an alternative remedy. *Alkali*, 325 U.S. at 204 (emphasis added); *De Beers*, 325 U.S. at 217 (emphasis added). Amicus's effort (at 33) to limit the application of *Alkali* and *De Beers* to situations in which a lower court has *exceeded* its jurisdiction, as opposed to declining improperly to exercise the jurisdiction with which it is vested (as in denials of leave to appeal), is unpersuasive. As Justice Stevens has explained, that argument is premised upon the "entirely unwarranted assumption" that those decisions, "decided only a few weeks after *House*, implicitly overruled that case." *Davis*, 454 U.S. at 913 n.1 (opinion of Stevens, J.).

it had jurisdiction to issue a common-law writ of certiorari in *House*.[11]

Issuance of the writ to review denials of leave to appeal is both necessary *and* appropriate in aid of the Court's appellate jurisdiction in this case, despite the Court's power to issue a certificate of appealability or a writ of habeas corpus on an original petition. As we explained above (in Section I) and in our opening brief (at 30-31), certificate decisions and writs of habeas corpus on original petitions are indirect, cumbersome, and inadequate tools for this Court's performance of its appellate function.[12]

Second, amicus repackages his argument that Section 2253 contains a silent statutory repeal of certiorari jurisdiction as an argument under Section 1651. He suggests (at 32-33) that the All Writs Act confers no jurisdiction if another statute even touches upon the situation that gives rise in a particular case to the need for a writ. To the contrary, another statute forecloses All Writs Act jurisdiction only when it actually evinces

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[11] Amicus's reliance (at 31) on this Court's prudential requirement "that adequate relief cannot be obtained in any other form or from any other court" (S. Ct. R. 20) is misplaced. The Court's Rule makes clear that the absence of another adequate remedy is merely a prerequisite to its "sparing[] exercise[]" of *discretion* to grant extraordinary writs — not a condition of the Court's *power* to act, which under the All Writs Act is plenary. See, *e.g.*, *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25-26 (1943) ("the question * * * is not whether the court * * * had power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power"). In any event, neither of the available alternatives is adequate, as we next explain.

[12] If the Court concurs in the Solicitor General's argument that this Court cannot grant a certificate except upon a "clear and indisputable" "substantial showing" of entitlement, and that Hohn's showing falls short of that heightened standard, then issuance of an extraordinary writ indisputably would be both necessary and appropriate here. See U.S. Mem. in Opp. to Hohn's Protective Application for a Certificate of Appealability at 2 (1/29/98). In that circumstance, literally no relief other than an extraordinary writ would be available. But, as we explain in our reply to that paper (filed 2/24/98), the Solicitor General's suggestion that the Court should impose such a heightened threshold showing contravenes the express language of Section 2253, which mandates that a certificate be issued upon only a "*substantial showing* of the denial of a constitutional right." 28 U.S.C. § 2253 (emphasis added).

a legislative intent to preclude such review.[13] See *Alkali*, 325 U.S. at 203 (review by "extraordinary writ is not permissible in the *face of [a] plain indication of [a] legislative purpose to avoid [such] review[]*") (emphasis added); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 172-173 (1977) ("[u]nless * * * confined by Congress, a federal court may avail itself of all auxiliary writs"). The question is a straightforward one of statutory interpretation: Did Congress, by adopting a "statute specifically address[ing] the particular issue at hand," eliminate certiorari jurisdiction it elsewhere has granted?

As we explained above, Section 2253 does not explicitly or impliedly bar the Court from exercising certiorari jurisdiction. Nor does the mere fact that Section 2253 makes available another, very different avenue for relief — an original application to a Circuit Justice for a certificate — suggest any "legislative purpose to avoid [certiorari] review[]." *Alkali*, 325 U.S. at 203. As we explained above, the two remedies are complementary, serving different functions. Section 2253, combined with Section 1651, suggests a congressional intent to give the Court a choice of methods for addressing circuit court errors in denying leave to appeal: a discretionary, full review to resolve legal issues of national importance; and a mandatory, fact-intensive "safety valve" to ensure individual justice even if no issues of national importance are presented.

Finally, amicus attempts to dismiss this Court's holding in *House* that it has the power to issue a common-law writ of certiorari on the theory that, at the time *House* was decided, Justices of the Court lacked jurisdiction to employ the "alternative" remedy of issuing a certificate.

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[13] Amicus errs in relying on *Carlisle* v. *United States*, 116 S. Ct. 1460 (1996) and *Marshals*, 474 U.S. at 42. In both cases, unlike the case at bar, petitioner sought a writ that would contravene an express statutory mandate. In *Carlisle*, the Court declined to issue an extraordinary writ to avoid a time limit imposed by the Federal Rules of Criminal Procedure. 116 S. Ct. at 1466. In *Marshals*, the Court refused to issue an extraordinary writ to compel federal marshals to produce a prisoner in the face of a statute that "expressly commands" that the writ "'*shall be directed to the person having custody* of the person detained,'" not to the federal marshals. 474 U.S. at 38-39 & n.4 (quoting 28 U.S.C. § 2243) (emphasis added). In contrast, as we explain above in Section I, neither Section 2253 nor any other statute contains any such express statutory command that would be undermined by issuance of an extraordinary writ here.

Am. Br. 13, 36-37. An extraordinary writ therefore was the only, and hence the appropriate, mechanism available to the Court for preventing the untimely demise of an appeal, amicus claims. He further argues that Congress rectified this situation in 1948, when it added the word "circuit justice" to Section 2253, thereby expressly authorizing the Justices of this Court for the first time to remedy erroneous denials of leave to appeal by the courts of appeals.

As the Solicitor General has explained (U.S. Reply 5-8), the problem with this argument is that its premise — that Justices of the Supreme Court lacked the power to issue certificates in 1945, when *House* was decided — is false. In 1945, the predecessor of Section 2253 conferred the power to issue a certificate of probable cause on "the United States court by which the final decision was rendered or a *judge of the circuit court of appeals.*" 28 U.S.C. § 466 (1940) (emphasis added). True, the word "justice" did not appear in that provision. But the term "judge of the circuit court of appeals" was defined by *another* statutory provision in Title 28 *to include the Justices of the Supreme Court in their capacity as Circuit Justices.*[14] That Congress had understood its reference in the certificate provision to "judges of the circuit court of appeals" to include Circuit Justices before the 1948 amendments is confirmed by its characterization of the 1948 amendments, which added the words "circuit justice," as an inconsequential "change[] * * * in phraseology." H.R. REP. NO. 80-308, at A180 (1947). See also BLACK'S LAW DICTIONARY 841 (6th ed. 1990) ("'Judge,' 'justice,' and 'court' are often used synonymously or interchangeably.").

Indeed, if amicus were correct in his assertion that the 1940 statute's reference to circuit judges excluded Justices of this Court, then the Justices may *still* lack the power to issue certificates. Federal Rule of Appellate Procedure 22(b) as amended by the AEPDA, like the 1940 version of Section 2253, confers the power to issue certificates upon "a district or a circuit judge," but not upon "circuit justices." Fed. R. App. P. 22(b) ("an appeal by the applicant for the writ may not proceed unless

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[14] Section 217 of Title 28 of the United States Code stated in 1940:

> The words "circuit justice" and "justice of a circuit" shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word "judge", when applied generally to any circuit, shall be understood to include such justice.

a *district or a circuit judge* issues a certificate of appealability") (emphasis added).

IV. THE ARGUMENT THAT SECTION 2253 POSES NO BAR TO JURISDICTION IN THIS CASE IS DIRECTLY RESPONSIVE TO THE QUESTION PRESENTED

Hohn argued in his merits brief that this Court has jurisdiction to grant, vacate, and remand the case despite the court of appeals' denial of a certificate, because the certificate requirement is inapplicable to him. He explained that, because Section 2253 does not apply retroactively to cases that were filed in the district court before the effective date of the AEDPA, his case was properly in the court of appeals upon his timely filing of his notice of appeal; and no statutory bar exists to this Court's certiorari jurisdiction.

Amicus and the government endeavor to dismiss this point on the procedural ground that Hohn did not raise it in his petition. But this case is not limited to one or any of the questions presented in Hohn's petition; instead, it involves a question of the Court's own creation. Hohn's argument is directly responsive to the Court's question.[15] If Section 2253 is not retroactive as to Hohn, the denial of a certificate pursuant to Section 2253 presents no bar to this Court's "jurisdiction to grant certiorari, vacate, and remand this case" to the court of appeals. J.A. 50. In any event, the question whether Section 2253 is retroactive to Hohn is jurisdictional; and jurisdictional issues may always be considered, whether or not raised in the petition for certiorari or below. See, *e.g.*, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 197 (1956).[16]

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[15] Because the Court formed its own question, both parties received notice of the question at the same time. Compare *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) (holding that one purpose of S. Ct. Rule 14.1(a) is to ensure that respondent receives "notice of the grounds upon which the petitioner is seeking certiorari"). Indeed, it was the Solicitor General who first raised the issue of *Lindh* v. *Murphy*, 117 S. Ct. 2059 (1997) (which was decided after Hohn filed his petition for certiorari) in his brief in response to Hohn's petition. Petitioner then argued in his reply that *Lindh* provided yet another reason why a grant of certiorari would be appropriate.

[16] Even if the non-retroactivity issue were not fairly included in the jurisdictional question the Court has posed, it would still be appropriate for the Court to reach it. The Court's intervening decision in *Lindh* v. *Murphy*, 117 S. Ct. 2059, 2068 (1997), effected a substantial change in controlling law

The government's effort to distinguish the Court's recent holding that the amendments to Chapter 153 of the AEDPA apply "only to cases filed after the Act became effective" (*Lindh* v. *Murphy*, 117 S. Ct. 2059, 2068 (1997)) is unpersuasive. Tellingly, the government makes *no* argument that Congress evinced any intent that Section 2253(c) should be treated differently from the other amendments to Chapter 153, which this Court held in *Lindh*, as a matter of statutory construction, do not apply to cases filed before the date of enactment. Nor could it: the same "negative implication" that compelled the conclusion that Congress did not intend for the amendments to Chapter 153 to apply to cases filed before the date of the AEDPA is equally applicable to Section 2253(c), which was created by one of those amendments. Instead, the Solicitor General simply reiterates the arguments grounded in *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), that the statute's terms would not produce a retroactive effect. But the *Lindh* majority rejected the *Landgraf* analysis as inapposite where, as here, it is possible to discern from the language of the statute and ordinary rules of statutory construction Congress's intent that a statute not apply retroactively. 117 S. Ct. at 2063.[17]

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and is an extraordinary circumstance that warrants an exception to the general rule. See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 896 n.7 (1984); *Northeast Bancorp, Inc.* v. *Board of Governors*, 472 U.S. 159, 176 (1985); *Cuyler* v. *Sullivan*, 446 U.S. 335, 342 n.6 (1980). See also *Blonder-Tongue Labs., Inc.* v. *University of Illinois Found.*, 402 U.S. 313, 320-321 & n.6 (1971). Before *Lindh*, every circuit to have addressed the issue had held that Section 2253 was retroactive to cases that were pending in the district court, but were not yet pending in the court of appeals. *E.g.*, *Lozada* v. *United States*, 107 F.3d 1011, 1012-1013 (2d Cir. 1997); *Santana* v. *United States*, 98 F.3d 752 (3d Cir. 1996); *United States* v. *Orozco*, 103 F.3d 389, 392 (5th Cir. 1996); *Lyons* v. *Ohio Adult Parole Auth.*, 105 F.3d 1063, 1075 (6th Cir. 1997); *United States* v. *Riddick*, 104 F.3d 1239, 1241 (10th Cir. 1997); *Hunter* v. *United States*, 101 F.3d 1565, 1567 (11th Cir. 1996) (en banc).

[17] Finally, Hohn did not "waive" his application for a certificate of appealability by failing to raise it in his petition, as amicus asserts (at 39-40). It is this Court's practice, upon denying a petition for certiorari to review a court of appeals' denial of a certificate of appealability, to consider *sua sponte* whether to issue a certificate, even when the petitioner has not requested one. See *Davis*, 454 U.S. at 913-915 (opinion of Stevens, J.); see also *id.* at 918 (Rehnquist, J., Burger, C.J. & Powell, J., dissenting). Hohn nonetheless filed a protective application for a certificate, alerting the Court of his intent to file the application and requesting its consideration in his brief on the merits. Br. 44-49 & n.34.

CONCLUSION

This Court should vacate the decision below and remand per the suggestion of the Solicitor General. In the alternative, the Court should either vacate and remand with instructions to consider Hohn's appeal, or grant Hohn a certificate of appealability.

Respectfully submitted.

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No. 96-8986

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Question Presented

Whether this Court has jurisdiction to grant certiorari, vacate and remand this case, per suggestion of Acting Solicitor General, where the Court of Appeals denied petitioner a Certificate of Appealability (28 U.S.C. §2253).

Table of Contents

Question Presented i

Interest of Amicus Curiae 1

Statement of the Case 2

Summary of Argument 5

ARGUMENT:

I. THIS COURT HAS STATUTORY JURISDICTION BY WHICH TO ENTERTAIN A FEDERAL PRISONER'S CERTIORARI PETITION ABSENT A CERTIFICATE OF APPEALABILITY FROM THE COURT OF APPEALS, WHERE THE LOWER COURT HAS NEVERTHELESS ADDRESSED THE MERITS OF HIS §2255 CLAIMS 6

II. THIS COURT MAY EXERCISE JURISDICTION BY INVOKING COMMON LAW CERTIORARI UNDER THE ALL WRITS ACT WHERE STATUTORY CERTIORARI IS UNAVAILABLE 8

III. A CERTIFICATE OF APPEALABILITY MAY BE ISSUED BY AN INDIVIDUAL CIRCUIT JUSTICE OR CIRCUIT JUDGE 11

IV. AEDPA'S CERTIFICATE OF APPEALABILITY REQUIREMENT DOES NOT APPLY RETROACTIVELY TO HABEAS CASES COMMENCED BEFORE THE STATUTE'S EFFECTIVE DATE 13

Conclusion 16

Table of Authorities

Cases

Allen v. Hardy, 478 U.S. 255 (1986) 3

Arredondo v. United States, 120 F.3d 639 (6th Cir. 1997) 14

Bailey v. United States, 116 S.Ct. 501 (1995) 3

Barefoot v. Estelle, 463 U.S. 880 (1983) 7

Burwell v. Teets, 350 U.S. 808 (1955) 3

Carafas v. LaVallee, 391 U.S. 234 (1968) 9

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 10

Davis v. Jacobs, 454 U.S. 911 (1981) 2

Felker v. Turpin, 116 S.Ct. 2333 (1996) 10

Hardwick v. Singletary, 122 F.3d 935 (11th Cir. 1997) . . 14

Head v. California, 374 U.S. 509 (1963) 9

Holiday v. Johnston, 313 U.S. 342 (1941) 9

House v. Mayo, 324 U.S. 42 (1945) 3

Humphrey v. Cady, 405 U.S. 504 (1972) 3

Hunter v. United States, 101 F.3d 1565 (11th Cir. 1996) . . 14

In re Burwell, 350 U.S. 521 (1955) 3

Jeffries v. Barksdale, 453 U.S. 914 (1981) 2

Kerr v. U.S. District Court, 426 U.S. 394 (1976) 14

Koo v. McBride, 124 F.3d 869 (7th Cir. 1997) 14

Lindh v. Murphy, 117 S.Ct. 2059 (1997) 4

Lozada v. Deeds, 498 U.S. 430 (1991) 3

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 7

Ojeda Rios v. Wigen, 863 F.2d 196 (2d Cir. 1988) 11

Rogers v. Teets, 350 U.S. 809 (1955) 3

Rosoto v. Warden, 83 S.Ct. 1788 (1963) 11

Smith v. Digmon, 434 U.S. 332 (1978) 3

Tiedman v. Benson, 122 F.3d 518 (8th Cir. 1997) 14

Trest v. Cain, 66 U.S.L.W. 4023 (1997) 1

United States v. Kunzman, 125 F.3d 1363 (10th Cir. 1997). 14

United States v. Nixon, 418 U.S. 683 (1974) 7

United States v. Perez, 1997 WL 691075 (2d Cir. 1997) 14

United States v. Skandier, 125 F.3d 178 (3d Cir. 1997) . . 14

Will v. United States, 389 U.S. 90 (1967) 14

Williams v. Cain, 117 F.3d 863 (5th Cir. 1997) 14

Miscellaneous

James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure (2d ed. 1994) 12

Dallin H. Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court, 1962 Sup. Ct. Rev. 153 3

Ira P. Robbins, The Habeas Corpus Certificate of Probable Cause, 44 Ohio St. L.J. 307 (1983) 2

Charles A. Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure (2d ed.) 7

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Interest of Amicus Curiae

Founded in 1958, the National Association of Criminal Defense Lawyers is one of the nation's leading organizations advancing the mission of criminal defense lawyers to ensure justice and due process for persons accused and convicted of crime. NACDL's mission, as defined in its bylaws, is to "[e]nsure justice and due process for persons accused of crime ... [f]oster the integrity, independence and expertise of the criminal defense profession ... and [p]romote the proper and fair administration of justice". NACDL has more than 9,000 members nationwide -- along with 78 state and local affiliate organizations numbering 25,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL has appeared before this Court on many occasions as amicus curiae. See, e.g., Trest v. Cain, 66 U.S.L.W. 4023 (1997).[1]

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1 Both parties have consented to NACDL's appearance in this matter as amicus curiae. No counsel for any party has authored this brief in whole of in part and no person or entity, other than amicus curiae, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

Statement of the Case

This case raises important questions relating to the power of this Court to entertain petitions for certiorari from state and federal prisoners who have been denied Certificates of Appealability from federal courts of appeals in seeking review of the denial of habeas corpus relief by the district courts. Historically, it had been only state prisoners seeking to appeal who were required to obtain certificates of probable cause to bring their cases before federal courts of appeals. See Ira P. Robbins, The Habeas Corpus Certificate of Probable Cause, 44 Ohio St. L.J. 307, 313-15 (1983).

However, the passage of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, effective April 24, 1996, newly codified at 28 U.S.C. §2253, now requires federal prisoners to obtain Certificates of Appealability in order to receive plenary appellate review of their §2255 motions. Under AEDPA, these certificates may be issued only where the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c).

The significance of the denial of this certificate is that courts of appeals summarily dismiss habeas appeals with the consequence that the litigant's case is not deemed to have properly been "in" the court of appeals for certiorari purposes under this Court's relevant jurisdictional statute. 28 U.S.C. §1254(1). See, e.g., Davis v. Jacobs, 454 U.S. 911, 912-19 (1981)(Stevens, J., opinion respecting denial of certiorari); id. at 920-22 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from denial of certiorari); Jeffries v. Barksdale, 453 U.S. 914, 915-16 (1981)(Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from denial of certiorari). See especially, Robbins, 44 Ohio St. L.J. at 308-12 & n.27

(discussing Davis and Jeffries).[2]

In the instant case, Arnold F. Hohn was convicted in the federal district of Nebraska in 1992 of the crime of "carr[ying]" a firearm "during and in relation to" the predicate offense of possession of drugs with intent to distribute them (18 U.S.C. §924(c)). Three years later, this Court decided Bailey v. United States, 116 S.Ct. 501 (1995), substantially narrowing the range of conduct deemed criminal under Section 924(c)'s "use" prong. Id. at 508-09. In so ruling, the Court overturned those courts of appeals, among them the Eighth Circuit, which had held that the only nexus required between a firearm and drugs was "availability", "accessibility", or "proximity" of the firearm to the defendant. Id. at 506, 508.

Because there was no evidence whatever that Hohn had in any respect "used" or "carried" a firearm as interpreted in Bailey, he filed a motion under 28 U.S.C. §2255 challenging his conviction under Section 924(c)(1). The district court

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2 Parenthetically, it should be noted that this Court has nevertheless regularly entertained certiorari petitions and granted plenary merits review in cases in which courts of appeals have denied certificates of probable cause. See, e.g., Lozada v. Deeds, 498 U.S. 430, 431-32 (1991); Allen v. Hardy, 478 U.S. 255, 257-58 (1986); Smith v. Digmon, 434 U.S. 332 (1978); Humphrey v. Cady, 405 U.S. 504, 506 (1972); Burwell v. Teets, 350 U.S. 808 (1955); Rogers v. Teets, 350 U.S. 809 (1955); In re Burwell, 350 U.S. 521, 522 (1955).

As Justice Stevens noted in Davis, 454 U.S. at 912-13, this Court squarely held in the procedurally identical case of House v. Mayo, 324 U.S. 42, 44-45 (1945), that even where the Court lacked statutory certiorari jurisdiction under the predecessor statute to §1254, it nonetheless retained common law certiorari power under the All Writs Act (28 U.S.C. §1651) to entertain the writ and grant plenary merits review. See also Dallin H. Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court, 1962 Sup. Ct. Rev. 153, 182-88 (discussing history of common law certiorari).

dismissed the motion on July 18, 1996 (Pet. App. 8a-9a) and a divided panel of the court of appeals (Magill & M.S. Arnold, JJ.)(McMillian, J., dissenting) denied him a certificate of appealability (99 F.3d 892)(Pet. App. 1a-7a). Rehearing and en banc review were denied on February 10, 1997 (Pet. App. 21a)(McMillian, Beam, Loken & Hansen, JJ., dissenting).

This Court has already granted certiorari in another case from the Eighth Circuit to consider the retroactive application of Bailey -- Bousley v. Brooks, No. 96-8516 (U.S. cert. granted September 29, 1997). In response to Hohn's certiorari petition, the Acting Solicitor General conceded that Hohn's claim that he is incarcerated for conduct that does not constitute a crime "may fairly be characterized as 'constitutional' and * * * the court [of appeals] erred in concluding otherwise." (Brief for United States, dated August 18, 1997, at 7). In confessing error on this critical point, the government suggested a remand to the court of appeals to allow it to reconsider whether petitioner has, in fact, made the requisite "substantial showing" within the meaning of §2253(c)(2) concerning his concededly constitutional claim to entitle him to full plenary merits review on appeal.

This Court instead has granted certiorari limited to the question of whether it has jurisdiction to act on the Acting Solicitor General's remand suggestion, in light of the court of appeals' prior denial of a certificate of appealability.[3]

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3 Another issue "fairly included" in the Court's jurisdictional question (Sup. Ct. Rule 14(a)) is whether its recent decision in Lindh v. Murphy, 117 S.Ct. 2059, 2063 (1997), decided after Hohn's certiorari petition was filed, conclusively establishes that AEDPA's appellate-certification procedure may not be applied retroactively in a case such as this, which was commenced in the district court prior to the effective date of the new habeas statute (April 24, 1996). As discussed at Point IV, infra, nonretroactivity of the appellate certification requirement for federal prisoners by itself mandates that Hohn's case be remanded to the court of appeals for plenary merits review on appeal.

SUMMARY OF ARGUMENT

1. This Court has statutory jurisdiction (28 U.S.C. §1254(1)) by which to entertain a federal petitioner's post-conviction certiorari petition absent a certificate of appealability from the court of appeals (28 U.S.C. §2253(c)). This Court clearly has the power to review courts of appeals' jurisdictional determinations. For those jurisdictional purposes, cases are deemed sufficiently "in" the court of appeals, under §1254, even where the court of appeals has determined that it lacked appellate jurisdiction. Moreover, where the court of appeals has combined merits review alongside its jurisdictional gatekeeper function, there can be no serious question that the case was effectively "in" the court of appeals sufficiently for this Court to exercise statutory certiorari jurisdiction.

2. This Court routinely invokes its common law certiorari authority under the All Writs Act (28 U.S.C. §1651) where the Court lacks statutory jurisdiction because the court of appeals declined to issue the necessary leave to appeal. This practice dates back to House v. Mayo, 324 U.S. 42 (1945) where the Court determined it had the power under common law certiorari not only to review the refusal to allow the appeal, but also to review the question on the merits raised by the appeal. Nothing contained in AEDPA's recent revision of the habeas statutes in any respect interferes with this Court's common law certiorari authority in this case.

3. The newly-enacted appellate certification requirement (§2253(c)(1)) limits the authorities empowered to issue a certificate to "a circuit justice or judge". Accordingly, plenary

appellate review should be afforded whenever either an individual circuit justice (of this Court) or a circuit judge (of the court of appeals) certifies that the habeas petitioner has made "a substantial showing of the denial of a constitutional right". §2253(c)(2). In this case, a dissenting circuit judge in the court of appeals has implicitly made this certification. A member of this Court, nonetheless, is also empowered to issue similar certification, which would have the effect of remanding this case to the court of appeals for plenary merits review.

4. AEDPA's appellate certification requirement does not apply retroactively to federal petitioners whose §2255 motions were pending in the district court prior to the date of the statute's enactment -- April 24, 1996. Lindh v. Murphy, 117 S.Ct. 2059 (1997). Since §2255 petitioners were entitled to appeal as of right under the predecessor statute to §2253, this case must be remanded to the court of appeals for plenary merits review.

ARGUMENT

I. THIS COURT HAS STATUTORY JURISDICTION BY WHICH TO ENTERTAIN A FEDERAL PRISONER'S CERTIORARI PETITION ABSENT A CERTIFICATE OF APPEALABILITY FROM THE COURT OF APPEALS, WHERE THE LOWER COURT HAS NEVERTHELESS ADDRESSED THE MERITS OF HIS §2255 CLAIMS

The threshold question raised in this case is whether, in light of the court of appeals' denial of a certificate of appealability, this case was adequately "in" the court of appeals to properly invoke this Court's certiorari jurisdiction. 28 U.S.C. §1254(1).

While it is clear, as discussed in Points II and III, infra, that this Court has several alternative bases upon which to exercise jurisdiction in this matter -- under the All Writs Act (28 U.S.C. §1651) as well as the habeas statutes themselves (28 U.S.C. §§2241(a) & 2253(c)(1)) -- this Court also possesses its customary statutory jurisdiction under §1254. See, e.g., Nixon v. Fitzgerald, 457 U.S. 731, 741-43 & n.23 (1982); United States v. Nixon, 418 U.S. 683, 690 (1974). Moreover, in light of the court of appeals in this case having, in effect, conducted plenary merits review along with its decision to deny the certificate -- a split decision rendered by a divided court -- this case was sufficiently "in" the court of appeals notwithstanding its denial of a certificate to entitle this Court to exercise its statutory jurisdiction. Barefoot v. Estelle, 463 U.S. 880, 889-92, 894 (1983).

As one set of commentators has candidly observed, "[p]eculiar difficulties have been encountered in establishing review of cases that arguably are not 'in' the court of appeals because of failure to secure a required permission for appeal." 17 Charles A. Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure §4036 at 14 (2d ed. 1988); see generally id. at 10-19.

Nevertheless, this Court has determined that even where the court of appeals had erroneously dismissed an appeal for lack of jurisdiction, the case was deemed sufficiently "in" the court of appeals for purposes of §1254 that it was properly within its certiorari jurisdiction. Nixon v. Fitzgerald, 457 U.S. at 743 n.23 ("There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction -- a power we have exercised routinely"). Indeed, Fitzgerald confirmed that this Court may review a ruling of the court of appeals that it lacked jurisdiction even if the result is to affirm the ruling as correct. Id. at 741-43.

In the case at bar, where the court of appeals -- obviously taking its cue from Barefoot -- has combined merits review alongside its quasi-jurisdictional gatekeeper function, there can be no serious question that for all practical purposes, this case was effectively "in" the court of appeals sufficient to pass muster under §1254(1). See 17 Wright et al., §4036 at 16 ("[S]tatutory certiorari should be available. Leave to appeal can be denied only after the court of appeals has so far considered the merits of the questions presented as to have brought the case within any reasonable purpose of the requirement that it be in that court. Indeed, statutory certiorari should be available in any other case in which it is claimed that a court of appeals has improperly denied leave to appeal")(and authorities collected therein).

It is axiomatic, then, that where the court of appeals has combined merits review alongside its quasi-jurisdictional gatekeeping function, it would be the ultimate exaltation of form over substance to assert seriously that this case was not adequately "in" the court of appeals sufficiently to qualify for statutory certiorari. Particularly where the lower court itself divided over the very merits of Hohn's Bailey claim, it may hardly be gainsaid that that court had, in effect, already granted him precisely the sort of plenary merits review to which a certificate of appealability would have otherwise entitled him. That being the case, Hohn should be entitled to invoke directly this Court's statutory certiorari jurisdiction.

II. THIS COURT MAY EXERCISE JURISDICTION BY INVOKING COMMON LAW CERTIORARI UNDER THE ALL WRITS ACT WHERE STATUTORY CERTIORARI IS UNAVAILABLE

As Justice Stevens noted in Davis, 454 U.S. at 912-14,

this Court may (and routinely does) invoke its common law certiorari authority under the All Writs Act (28 U.S.C. §1651) in circumstances virtually identical to those in the case at bar -- where the Court lacks statutory certiorari jurisdiction because the court of appeals declined to issue the necessary leave to appeal. See Robbins, 44 Ohio St. L.J. at 312 n.27.

In House v. Mayo, 324 U.S. 42 (1945), this Court determined that it lacked certiorari jurisdiction under the predecessor statute to §1254 where the lower court had denied a certificate of probable cause to appeal. Nevertheless, relying on prior Court decisions defining the scope of the common law writ of certiorari under the All Writs Act, the Court found the power not only to review the refusal to allow the appeal, but also to review the question on the merits raised by the appeal. 324 U.S. at 44-45.[4]

Accordingly, since House, the arguable unavailability of statutory certiorari has routinely been cured by use of common law certiorari, which is now the customary vehicle invoked where a petitioner has been unable to secure permission to appeal or leave to appeal in forma pauperis from the court of appeals. See 17 Wright, §4036 at 14-16 (and cases collected therein); see also id., §4005 at 111-12. Indeed, the practice has become so commonplace that the Court no longer distinguishes simple denials of statutory certiorari from refusals to invoke common law certiorari. Davis, 454 U.S. at 914; cf. Head v. California, 374 U.S. 509 (1963)(application for common law certiorari granted as petition for statutory certiorari); Carafas v. LaVallee, 391 U.S. 234 (1968)(accord); as well as the cases cited earlier in this brief, ante, at 3 n.2.

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4 Professor Oaks provides the most thorough discussion of the evolution of common law certiorari culminating in House and Holiday v. Johnston, 313 U.S. 342 (1941). See Oaks, 1962 Sup. Ct. Rev. at 182-88.

Nor have Congress' recent habeas revisions under AEDPA in any respect abrogated this Court's statutory (or common law) certiorari jurisdiction. In Felker v. Turpin, 116 S.Ct. 2333 (1996), this Court determined that while newly-amended §2244(b)(3)(E) explicitly precluded this Court from reviewing by way of certiorari a court of appeals' refusal to entertain a successive writ application, it did not otherwise interfere with this Court's power to entertain a successive writ application as an original matter in the Court. Id. at 2338-39.

Certainly, if amended §2244(b) -- which explicitly abrogated statutory certiorari in successive writ cases -- was not deemed a repeal by implication of this Court's common law habeas authority, then a fortiori §2253(c)(1) -- which contains no language respecting the Court's certiorari authority and, indeed, explicitly authorizes "a circuit justice" to issue a certificate of appealability -- may hardly be construed to abolish or in any respect interfere with this Court's common law (or statutory) certiorari jurisdiction. As long ago as 1821, in Chief Justice Marshall's opinion in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), this Court required a clear statement before concluding that Congress intended to affect this Court's appellate jurisdiction. Id. at 379-80.[5]

Accordingly, this Court remains free to exercise its common law certiorari authority under the All Writs Act and remand this case to the court of appeals, as suggested by the Acting Solicitor General.

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5 Indeed, except for §2244(b)'s limitation on "writ[s] of certiorari" in the context of successive habeas petitions, the AEDPA makes no other mention of this Court's jurisdiction.

III. A CERTIFICATE OF APPEALABILITY MAY BE ISSUED BY AN INDIVIDUAL CIRCUIT JUSTICE OR CIRCUIT JUDGE

The newly-enacted appellate certification requirement (§2253(c)(1)) limits the authorities empowered to issue a certificate to "a circuit justice or judge", thereby leaving an open question whether the certificate is to be issued by an individual justice or circuit judge as opposed to the Court itself or a three-judge panel. The distinction is not a trivial one -- compare §2253(c)(1)("a circuit justice or judge") with §2244(b)(3)(B)(authorization for permission to file second or successive petition must be granted by "a three-judge panel of the court of appeals").

Congress' choice of different language for different provisions of the AEDPA clearly manifests an intention to create different procedures for separate provisions of the Act. See Lindh, 117 S.Ct. at 2063 (chapter 153 interpreted prospectively in the absence of chapter 154's specific retroactivity language). While a court of appeals may choose to assign such motions to three-judge panels, see In re Burwell, 350 U.S. at 522, it cannot thereby repeal petitioner's statutory right to appeal with the permission of a single judge. Compare Ojeda Rios v. Wigen, 863 F.2d 196, 199-200 & n.3 (2d Cir. 1988)(Newman, J., in chambers)(discussing relevance and importance of distinctions between "judges" and "courts" in context of habeas corpus).[6]

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6 As noted by Justice Stevens in Davis, 454 U.S. at 913-14, under now-superseded §2253, a circuit justice, or the Court itself, was empowered to issue a certificate of probable cause, citing Rosoto v. Warden, 83 S.Ct. 1788 (1963)(Harlan, J., in chambers). Of course, under the old statute, federal §2255 petitioners had no need of appellate certification; their cases were appealable as of right.

Accordingly, Hohn is entitled to plenary appellate review where either an individual circuit justice (of this Court) or a circuit judge (of the court of appeals) certifies that he has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2).

In this case, Judge McMillian, albeit outvoted by his two colleagues, nonetheless made precisely the certification called for by the new statute (Pet. App. 2a-7a). Indeed, the Acting Solicitor General made virtually the same concession when he represented to this Court that Hohn's claim was substantial and warranted remand to the court of appeals. Moreover, this Court's grant of certiorari in Bousley to resolve the underlying retroactivity question of Bailey is not without relevance here. Indeed, among the principal identifiable reasons for granting appellate certification is that this Court has granted certiorari to review a "similar" question in another case. See 2 James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure §35.4b at 1079-80 n.17 (2d ed. 1994)(and cases collected therein).

Under the totality of these unique circumstances -- and even in the absence of Judge McMillian's dissent on the merits -- any individual justice of this Court clearly has the authority to grant Hohn a certificate of appealability and remand his case to the court of appeals where it would then receive full plenary merits review.[7]

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7 Analogy may, indeed, be drawn with this Court's Rule of Four, whereby a minority of the Justices of this Court may nonetheless grant plenary review to a case, even where outvoted by a majority of their colleagues. See, e.g., John Paul Stevens, The Life Span Of A Judge-Made Rule, 58 NYU L. Rev. 1, 10, 16-20 (1983). Of course, the Rule of Four is a judge-made rule of practice, whereas the individual circuit justice/circuit judge rule is explicitly mandated by Congress.

IV. AEDPA'S APPELLATE CERTIFICATION REQUIREMENT DOES NOT APPLY RETROACTIVELY TO CASES COMMENCED PRIOR TO ITS EFFECTIVE DATE

In Lindh v. Murphy, this Court held that AEDPA's amendments to Chapter 153 of Title 28, United States Code -- including §2253(c), the provision requiring certificates of appealability -- do not apply to cases that were already pending on the date AEDPA was signed into law -- April 24, 1996. 117 S.Ct. at 2063 ("The statute reveals Congress's intent to apply the amendments to chapter 153 only to such cases as were filed after the statute's enactment * * * We read this provision ... as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act"). The government concedes here that Hohn's §2255 petition was already pending in the district court prior to AEDPA's enactment.

AEDPA's nonretroactivity is significant in the context of this case. Under prior law, federal §2255 petitioners were not required to obtain permission to appeal to the court of appeals; their habeas appeals, unlike those of state prisoners, were heard as a matter of right. See Robbins, 44 Ohio St. L.J. at 313-15.

Accordingly, under Lindh, federal petitioners such as Hohn are entitled to automatic plenary merits review in the court of appeals where their §2255 petitions were pending in the district court prior to April 24, 1996. Independent of all other grounds for relief in this case, the court of appeals' retroactive misapplication of the appellate certification procedure to Hohn has created the anomalous situation in which it may have improperly deprived this Court of its own statutory jurisdiction

to review a jurisdictional error committed by the lower court insofar as it declined to exercise mandatory jurisdiction over an appeal it was legally required to accord plenary merits review. See Kerr v. U.S. District Court, 426 U.S. 394 (1976)(common law writs used to correct lower courts' jurisdictional errors); Will v. United States, 389 U.S. 90, 95 (1967)(common law writ appropriate "to compel [inferior court] to exercise its authority when it is its duty to do so"). See also Robert L. Stern et al., Supreme Court Practice §11.2(2) at 495 (7th ed. 1993)("Correcting jurisdictional error"); id. §11.2(3) at 500-01 ("Protecting appellate jurisdiction of Supreme Court").

Indeed, the courts of appeals have held with virtual unanimity that, in the wake of Lindh, appellate certification is not required for federal petitioners whose §2255 petitions were pending in the district court prior to April 24, 1996. See, e.g., United States v. Perez, 1997 WL 691075 at *5-6 (2d Cir. 1997); United States v. Skandier, 125 F.3d 178, 180-82 (3d Cir. 1997); Williams v. Cain, 117 F.3d 863, 864-65 (5th Cir. 1997); Arredondo v. United States, 120 F.3d 639 (6th Cir. 1997); Koo v. McBride, 124 F.3d 869, 872 (7th Cir. 1997); United States v. Kunzman, 125 F.3d 1363, 1364 & n.2 (10th Cir. 1997); Hardwick v. Singletary, 122 F.3d 935 (11th Cir. 1997). [8]

The only court to rule otherwise is the Eighth Circuit in Tiedman v. Benson, 122 F.3d 518 (8th Cir. 1997). It did so applying a tortuous reading of Lindh, viewing this Court's use

---

8 Indeed, in Perez, supra at *5, the Second Circuit interpreted the Lindh Court's reference to Hunter v. United States, 101 F.3d 1565 (11th Cir. 1996)(en banc), which addressed the analogous question at issue here, as an indication of the Court's intention to address the retroactivity of all of new chapter 153's provisions enacted by the AEDPA. See also Williams v. Cain, 117 F.3d at 864-65. As the Eleventh Circuit subsequently noted, Lindh effectively overruled that portion of its Hunter decision suggesting that the AEDPA's provisions applied retroactively. Hardwick, 122 F.3d at 936.

of the word "generally" in the majority opinion's penultimate sentence (117 S.Ct. at 2068) as significantly qualifying its holding, implying that this Court did not mean to suggest that all of Chapter 153's provisions applied prospectively. The Third and Tenth Circuits have considered and rejected this strained interpretation out of hand. Skandier, 125 F.3d at 182; Kunzman, 125 F.3d at 1364 n.2. As Judge Becker resolved the question in Skandier:

> The essential message of Lindh, we believe, is that we need not resort to a Landgraf analysis with its default rules of retroactive/prospective application when the intent of Congress is clear and no Constitutional violation would be worked by applying the statute as Congress intended.
>
> * * *
>
> Thus, since §2253(c) is part of chapter 153, we hold that that section should not apply to a §2255 motion that was filed before AEDPA's effective date. Because we dispose of this case on the grounds of Congressional intent, as the Supreme Court itself has found it, we need not address the matters that would be predicate to determining applicability of the default rules.

Under the totality of circumstances, then, Lindh dictates the result here. No certificate of appealability was required for Hohn to receive full-dress plenary merits review of his appeal. Just as this Court determined in Felker that it retained original habeas jurisdiction to review errors committed in the courts of appeals in the consideration of successor habeas petitions under AEDPA, so, too, this Court retains the power to review courts

of appeals' refusals to exercise their own jurisdiction to entertain appeals they are otherwise required to hear on the merits.

Accordingly, this Court should remand this case to the court of appeals with instructions to exercise its plenary merits review function. Barefoot v. Estelle, 463 U.S. at 894.

Conclusion

The judgment of the court of appeals should be vacated and the case remanded to the court of appeals for further consideration, inter alia, of Bailey v. United States, 116 S. Ct. 501 (1995).

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

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QUESTION PRESENTED

In light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Solicitor General?

TABLE OF CONTENTS

Page

JURISDICTION 1

STATUTORY PROVISIONS AND RULES INVOLVED 1

STATEMENT 1

A. The Gatekeeping Requirement for Habeas Corpus Appeals 2

B. The Certiorari Statute 4

C. The All Writs Act 5

D. The Underlying Proceedings 7

SUMMARY OF ARGUMENT 10

ARGUMENT 14

I. Article III Vests Congress With Power To Streamline Appellate Review Of Habeas Corpus Cases 14

II. Under The Plain Terms Of Sections 1254(1), 1651, And 2253(c)(1), Congress Has Not Given The Supreme Court Certiorari Power To Review Unsuccessful Applications For A Certificate Of Appealability 15

III. Case Law Confirms This Interpretation 20

A. Longstanding Precedent Emphasizes That Leave-To-Appeal Decisions May Not Be Reviewed Under § 1254(1) 21

1. Several Decisions of The Court Support This Interpretation 21

2. Mr. Hohn's Contrary Arguments Are Mistaken 24

TABLE OF CONTENTS – Continued

Page

B. Precedent Demonstrates That The Court May Not Review An Application For A Certificate Of Appealability Under The All Writs Act 30

1. Mr. Hohn's Petition Raises No Urgency And Asks The Court To Construe § 1651 To Create Jurisdiction That Congress Has Expressly Addressed Elsewhere 30

2. Neither *House v. Mayo* Nor Any Other Decision Alters This Conclusion 35

IV. Mr. Hohn's Other Arguments Exceed The Scope Of The Question Presented, And Have Been Waived 39

CONCLUSION 43

TABLE OF AUTHORITIES

Page

CASES

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) 38

Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331 (1948) 29

Bailey v. United States, 516 U.S. 137 (1995) 8

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953) 31, 32

Barefoot v. Estelle, 463 U.S. 880 (1983) 2, 28, 29

Beavers v. Pruett, 118 S.Ct. 621 (1997) 20

Bilik v. Strassheim, 212 U.S. 551 (1908) 22

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 40

Carbo v. United States, 364 U.S. 611 (1961) 6

Carlisle v. United States, 517 U.S. 416 (1996) 13, 30, 32, 35

Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 42

Davis v. Jacobs, 454 U.S. 911 (1981) 12, 21, 23, 24

DeBeers Consolidated Mines, Ltd. v. United States, 325 U.S. 212 (1945) 34

Durousseau v. United States, 10 U.S. (6 Cranch) 307 (1810) 14

Ex Parte Patrick, 212 U.S. 555 (1908) 22

Ex Parte Peru, 318 U.S. 578 (1942) 5, 31

TABLE OF AUTHORITIES – Continued

Page

FEC v. NRA Political Victory Fund, 513 U.S. 88 (1994) 25

Felker v. Turpin, 116 S. Ct. 2333 (1996) 14, 15

Ferguson v. District of Columbia, 270 U.S. 633 (1926) 23

Fornaris v. Ridge Tool Co., 400 U.S. 41 (1976) 41

Forsyth v. Hammond, 166 U.S. 506 (1897) 29

Hagans v. Lavine, 415 U.S. 528 (1974) 25

House v. Mayo, 324 U.S. 42 (1945) ..... *passim*

In re Burwell, 350 U.S. 521 (1956) 24

In re 620 Church Street Bldg. Corp., 299 U.S. 24 (1936) 23, 37

In re Commonwealth of Massachusetts, 197 U.S. 482 (1905) 34

Jeffries v. Barksdale, 453 U.S. 914 (1981) 22, 28

Kennedy v. Lainson, 323 U.S. 780 (1944) 23

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994) 41

Lindh v. Murphy, 117 S. Ct. 2059 (1997) 27

McCarthy v. Harper, 449 U.S. 1309 (1981) 22

McClung v. Stillman, 19 U.S. (6 Wheat) 598 (1821) 34

McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813) 34

McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936) 41

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 27, 28

TABLE OF AUTHORITIES – Continued

Page

Olmstead v. United States, 277 U.S. 438 (1928) 42

Parr v. United States, 351 U.S. 513 (1956) 35

Parker v. Randolph, 442 U.S. 62 (1979) 40

Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34 (1985) ..... *passim*

Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943) 34

Snyder v. Harris, 394 U.S. 332 (1969) 42

United States v. Beatty, 232 U.S. 463 (1914) 34

United States v. Jones, 990 F.2d 1047 (8th Cir. 1993), *cert. denied*, 510 U.S. 1048 (1994), *denial of habeas corpus aff'd*, 39 F.3d 1184 (8th Cir. 1994) 8

United States v. Nixon, 418 U.S. 683 (1974) 27

U.S. Alkali Export Assn. v. United States, 325 U.S. 196 (1945) 33

Will v. Michigan Dept. Of State Police, 491 U.S. 58 (1989) 25

CONSTITUTION, STATUTES AND RULES

U.S. Const., Art. III, § 1 14

U.S. Const., Art. III, § 2 ..... 11, 14

Judiciary Act of 1789, § 14, 1 Stat. 81 6

Act of March 3, 1891, ch. 517, § 6, 26 Stat. 828 5

Act of March 10, 1908, ch. 76, 35 Stat. 40 3

Act of March 3, 1911, ch. 231, § 240, 36 Stat. 1157 6

TABLE OF AUTHORITIES – Continued

Page

Act of February 13, 1925, ch. 229, § 240(a), 43 Stat. 938 35

Act of June 25, 1948, ch. 646, § 2253, 62 Stat. 967 ... 4, 7

Act of May 24, 1949, ch. 139, § 90, 63 Stat. 102 7

H.R. Rep. No. 23, 60th Cong., 1st Sess., 2 (1908); 42 Cong. Rec. 608-09 (1908) 3

H.R. Rep. No. 308, 80th Cong., 1st Sess. (1948) 7

18 U.S.C. 922(g) 8

18 U.S.C. 924 8

21 U.S.C. 845a 8

28 U.S.C. 466 (1940) 3

28 U.S.C. 1254(1) ..... *passim*

28 U.S.C. 2101(c) 35

28 U.S.C. 2241 ..... 11, 15

28 U.S.C. 2253(c)(1) ..... *passim*

28 U.S.C. 2255 ..... *passim*

28 U.S.C. 1651(a) ..... *passim*

S.Ct. R. 20(1) ..... *passim*

OTHER AUTHORITY

Blackmun, *Allowance of In Forma Pauperis Appeals In Section 2255 and Habeas Corpus Cases*, 43 F.R.D. 343 (1967) 28

JURISDICTION

On November 4, 1996, the court of appeals denied Mr. Hohn a certificate of appealability, and on February 10, 1997 denied his petition for rehearing. On May 12, 1997, Mr. Hohn filed a petition for a writ of certiorari, trying to invoke jurisdiction under 28 U.S.C. 1254(1). Because no judge or justice has granted him leave to appeal, as required under 28 U.S.C. 2253(c)(1), because his case was never "in" that court, as required under § 1254(1), and because his case does not otherwise meet the requirements of 28 U.S.C. 1651, he may not rely on either the statutory or common law writ. The Court accordingly lacks jurisdiction to grant certiorari, vacate, and remand the case, and should dismiss the petition.

STATUTORY PROVISIONS AND RULES INVOLVED

The relevant statutory provisions and rules are reproduced in an appendix to this brief.

STATEMENT

This case concerns the one aspect of the Court's jurisprudence that perhaps rivals the importance of its authority to engage in judicial review, namely the sensitive determination of when such power exists. At issue are three lines of federal legislation regarding the Court's jurisdiction – one concerning its power to review habeas corpus claims, another addressing its authority to exercise appellate jurisdiction through a writ of certiorari, the

last addressing its power under the All Writs Act. Because the issues raised by Mr. Hohn's certiorari petition implicate all three pieces of legislation and because the background of each law bears on this dispute, it is useful at the outset to set forth the history of the three statutes as well as the circumstances that make them relevant to Mr. Hohn.

A. The Gatekeeping Requirement for Habeas Corpus Appeals.

Since the turn of the century, Congress has limited the rights of habeas corpus claimants to seek appellate review of their claims. "In 1908, concerned with the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process, Congress inserted the requirement that a prisoner first obtain a certificate of probable cause to appeal before being entitled to do so." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.3 (1983) (citation omitted). To this end, Congress enacted the following requirement:

> That from a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a State court *no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal*, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance.

Act of March 10, 1908, ch. 76, 35 Stat. 40 (emphasis added).

Entitled "An Act Restricting in Certain Cases the Right of Appeal to the Supreme Court in Habeas Corpus Proceedings," the statute had a straightforward goal. It sought to make "it impossible to continue th[e] vicious practice" of delaying the execution of sentences and undermining the finality of criminal sentences, "as under it no appeal can be prosecuted unless either the United States court making the final decision or a justice of the Supreme Court shall be of the opinion that there exists probable cause for such appeal." H.R. Rep. No. 23, 60th Cong., 1st Sess., 2 (1908); 42 Cong. Rec. 608-09 (1908).

In 1925, while enacting legislation designed to curb the Court's obligatory jurisdiction, Congress modified the gatekeeping requirement. Instead of allowing unsuccessful habeas claimants to seek leave to appeal from a justice of the Court, the amendment allowed applicants only to seek leave from the district court judge who denied the claim or from a judge of the court of appeals. Act of February 13, 1925, ch. 229, §§ 6(d), 13, 43 Stat. 940, 942; 28 U.S.C. 466; Appendix.

Twenty-three years later, Congress amended the statute again, this time giving the habeas claimant three sources for obtaining a certificate of probable cause – the district court, the court of appeals or the Supreme Court. Accordingly, starting in 1948, the statute provided that "an appeal may not be taken to the court of appeals . . . unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable

cause." Act of June 25, 1948, ch. 646, § 2253, 62 Stat. 967, 28 U.S.C. 2253; Appendix.

Finally, in 1996, Congress reenforced the leave-to-appeal requirement with passage of The Anti-Terrorism and Effective Death Penalty Act (the "Act" or "AEDPA"). The legislature gave the gatekeeping requirement a more explicit name (a "certificate of appealability"), extended the requirement to habeas claims brought by federal prisoners under § 2255, and required all claimants (federal or State) to demonstrate "a substantial showing of the denial of a constitutional right." In its current form, the requirement thus provides that "an appeal may not be taken" "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. 2253(c)(1).

B. The Certiorari Statute.

In contrast to the gatekeeping requirement, the story of congressional legislation regarding the Court's certiorari jurisdiction has primarily been one of continuity, not change. Congress first vested the Court with certiorari power to review federal courts of appeals' decisions in 1891. In the same Act that established these appellate courts, Congress gave the Court the following power:

> And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

Act of March 3, 1891, ch. 517, § 6, 26 Stat. 828.

After making a slight modification to the statute in 1911, *see* Appendix, Congress enacted legislation in 1925 designed "to curtail the Court's obligatory jurisdiction by substituting, for the appeal as of right, discretionary review by certiorari in many classes of cases." *Ex Parte Peru*, 318 U.S. 578, 585 n.4 (1942). In doing so, Congress made clear that the Court's certiorari power extends to "any case, civil or criminal, in a circuit court of appeals." Act of February 13, 1925, ch. 229, § 240(a), 43 Stat. 938; Appendix.

Amendments to the provision in 1948 and again in 1988 brought the provision to its current form, which now reads:

> *Cases in the courts of appeals* may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. 1254(1) (emphasis added).

C. The All Writs Act.

The All Writs Act has long been a constant on the judicial landscape. First enacted as part of the Judiciary Act of 1789, the "extraordinary writ" has always required at a minimum some form of necessity before it could be deployed. *See Pennsylvania Bureau of Correction v. United*

States Marshals Service, 474 U.S. 34, 43 (1985). In its initial form, the law provided as follows:

> That all the before-mentioned courts of the United States shall have power to issue writs of scire facias [to enforce a judgment], habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

Judiciary Act of 1789, § 14, 1 Stat. 81.

Several modest changes to the provision occurred over the next 120 years, the primary one being the severance of the writ of habeas corpus from the All Writs Act. *See Carbo v. United States*, 364 U.S. 611, 615 & n.6 (1961). Congress did not modify the provision again until 1911, when it altered the statute to provide:

> The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Act of March 3, 1911, ch. 231, § 262, 36 Stat. 1162.

Finally, in 1948 (coupled with a minor alteration in 1949), Congress amended the provision to its current form, which now reads:

> The Supreme Court and all courts established by Act of Congress may issue all writs

> necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. 1651(a); *see* Act of June 25, 1948, ch. 646, 62 Stat. 944; Act of May 24, 1949, ch. 139, § 90, 63 Stat. 102. In making these changes, Congress merely "consolidated various provisions into § 1651 and made 'necessary changes in phraseology' without substantive amendment." *Pennsylvania Bureau of Correction v. U.S. Marshals*, 474 U.S. 34, 41 (1985) (quoting H.R. Rep. No. 308, 80th Cong., 1st Sess. A144).

D. The Underlying Proceedings.

These statutes, together with the history behind them, became relevant to Arnold Hohn when he chose to distribute methamphetamine from his home in Omaha, Nebraska. After learning from an informant that Mr. Hohn was selling drugs from his residence and that he always had at least one gun on his person, the police obtained a "no knock" warrant to search his house. On June 20, 1990, they conducted the search, which uncovered 16 grams of methamphetamine, drug paraphernalia, several weapons and money. The police found the drugs and three loaded weapons (two in holsters) within a few feet of each other on the kitchen counter. Elsewhere in the kitchen and the house, they found three other firearms, one of them loaded. J.A. 34, 43.

The police promptly arrested Mr. Hohn. They charged him with using and carrying a firearm in relation to a drug offense under 18 U.S.C. 924(c)(1), possession with intent to distribute methamphetamine within 1000

feet of a public school under 21 U.S.C. 845a and being a felon in possession of a firearm in violation of 18 U.S.C. 922(g) and 924(a).

A jury convicted Mr. Hohn on all three counts, and he was sentenced to 90 months in prison. He appealed to the Eighth Circuit, raising three claims – that the federal government violated the Speedy Trial Act, that his motion to suppress evidence from the search of his residence should have been granted, and that the charge concerning drug distribution within the vicinity of a schoolyard should have been dismissed. J.A. 12-26. Nowhere in his appeal did he challenge the sufficiency of the evidence to support his § 924(c)(1) conviction for using or carrying a firearm in relation to a drug offense. *Id.* On November 8, 1993, the court of appeals affirmed. *Id.*

On January 24, 1996, Mr. Hohn filed a motion in the United States District Court for the District of Nebraska to vacate, set aside or correct his sentence under 28 U.S.C. 2255. Relying on this Court's decision in *Bailey v. United States*, 116 S. Ct. 501 (1995), he argued that his conduct did not violate § 924(c)(1) because the government failed to show that he was "using" a firearm in the course of a drug transaction. In *Bailey*, the Court determined that "use" requires the government to prove "an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Id.* at 505. The decision overruled prior lower-court authority to the effect that " 'use' may be inferred from the availability and presence of the firearm." *United States v. Jones*, 990 F.2d 1047, 1050 (8th

Cir. 1993), *cert. denied*, 510 U.S. 1048 (1994), *denial of habeas corpus aff'd*, 39 F.3d 1184 (8th Cir. 1994).

On April 24, 1996, while the district court was considering Mr. Hohn's § 2255 petition, the President signed into law the Anti-Terrorism and Effective Death Penalty Act. The new law modified the process for appealing a § 2255 motion, requiring the inmate to obtain a "certificate of appealability" as a prerequisite to an "appeal- . . . from . . . the final order in a proceeding under section 2255." 28 U.S.C. 2253(c)(1). Such a certificate may issue, the Act provided, only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2).

On July 18, 1996, the district court rejected Mr. Hohn's § 2255 motion. The court concluded that he had waived any claim to challenge the jury instructions regarding "use" because he did not object to the instructions on direct appeal. J.A. 37.

On July 29, 1996, Mr. Hohn filed a notice of appeal. Treating the notice as a certificate of appealability under the three-month-old AEDPA, the Eighth Circuit denied Mr. Hohn leave to appeal. It reasoned that at most he was "making a claim to a federal statutory right," not a "constitutional claim" as required under the statute. J.A. 42. "*Bailey* did no more than interpret a statute," the court concluded, "and an incorrect application of a statute by a district court, or any other court, does not violate the Constitution." *Id.* Because "petitioner makes no due process claim with respect to the trial judge's action" and because in any event "trial errors hardly ever rise to the level of a due process violation," the court found that Mr.

Hohn had not made a "substantial showing of the denial of a constitutional right" as required under § 2253(c)(2). *Id.*

At that point, Mr. Hohn did not seek leave to appeal from a justice of the Supreme Court, as permitted under § 2253(c)(1). Instead, he filed a petition for a writ of certiorari, attempting to invoke jurisdiction under 28 U.S.C. 1254(1). The petition sought review of the court of appeals' determination that he was not entitled to a certificate of appealability because his claim raises a statutory, not a constitutional, question. In response, the government agreed that Mr. Hohn's claim could be characterized as constitutional, and that the court of appeals erred in reaching a contrary conclusion. The government suggested that the petition should be granted, the lower court decision vacated, and the case remanded for further consideration whether a certificate of appealability should issue.

On October 31, 1997, the Court granted certiorari. In light of the court of appeals' denial of Mr. Hohn's request for a certificate of appealability, the Court limited certiorari to whether it had jurisdiction to act on the suggestion of the Solicitor General of the United States to grant, vacate and remand the case.

SUMMARY OF ARGUMENT

The Court lacks jurisdiction over the petition. Congress has precluded the Court from exercising statutory or common law certiorari power over a court of appeals'

denial of an inmate's application for a certificate of appealability.

1. Under the exceptions and regulations clause (U.S. Const., Art. III, § 2), Congress may streamline collateral review of requests for release filed by federal and State prisoners. It thus may prohibit appellate review of – and terminate – a rejected habeas corpus petition in the event the applicant fails to obtain leave to appeal. Nothing about such legislation tests the borders of Congress's power under the clause. Because the claimant remains free to file an "original" habeas corpus application in this Court under 28 U.S.C. 2241, or an application for a certificate of appealability with a justice of the Court, the law does not exceed congressional power.

2. Congress not only has the power to regulate the Court's appellate jurisdiction in this way, but it also has unmistakably done so in this instance. In unyielding terms, § 2253(c)(1) says that "an appeal may not be taken to the court of appeals" in the absence of a "certificate of appealability" from an Article III judge or justice. The plain import of the language of the provision is to expedite review by setting a specific course for considering requests for leave to appeal and by finalizing those cases that fail to obtain the required certificate.

The language of §§ 1254(1) and 1651 cements this conclusion. Section 1254 requires a "case" to be "in" the court of appeals before certiorari may be sought. Denial of leave to appeal prevents the case from ever entering the court of appeals, and it defies common sense to conclude that a certificate-to-appeal-a-case is itself a case. Because Mr. Hohn retains discretion to seek a certificate

of appealability from this Court, he also cannot credibly argue that a common law writ of certiorari is "necessary" or "appropriate" "in aid" of the Court's jurisdiction. The certificate-of-appealability option does everything that § 1651 could possibly do for him. It allows the Court to dispense individual justice (by granting leave to appeal when due), and to provide guidance regarding the gatekeeping standard (by interpreting the standard in reviewing an application itself). Nor would a common law writ be used "in aid" of the Court's jurisdiction. Quite to the contrary, he is looking to the writ precisely to evade the express requirements of §§ 2253(c)(1) and 1254(1), not to supplement them.

3. The Court's decisions all respect the plain language of these jurisdictional limitations.

a. Since 1908, when Congress first imposed a gatekeeping standard on appellate review of collateral challenges to a criminal sentence, the Court's opinions have unanimously precluded inmates from invoking § 1254(1) (or its predecessors) to seek review of a denied leave to appeal. In *House v. Mayo*, 324 U.S. 42 (1945), for example, the Court prevented an inmate from doing just that. Because jurisdiction under the certiorari statute "extends only to cases 'in a circuit court of appeals,' " and because "the case was never 'in' the court of appeals, for want of a certificate of probable cause," the Court refused to exercise its statutory certiorari powers over the petition. *Id.* at 44. Other opinions follow the same course. *See, e.g., Davis v. Jacobs*, 454 U.S. 911 (1981).

b. Case law also prevents litigants from using the All Writs Act to escape the detailed jurisdictional

requirements of §§ 2253 and 1254(1). Because the Act is a "residual source of authority," not a free flowing source of jurisdiction, because it only permits the Court "to issue writs that are not otherwise covered by statute," *Carlisle v. United States*, 116 S. Ct. 1460, 1467 (1996) (quotation omitted), and because it requires necessity of some kind, the Act has no application here. Mr. Hohn self-evidently is trying to use the Act to avoid the consequences of "express statutory provision[s]" that prohibit jurisdiction. *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 42 (1985). And, even if this were permissible, the option of applying for a certificate of appealability to the Court dooms any claim that extraordinary or exceptional circumstances require relief in this instance.

House v. Mayo does not alter this conclusion. When the Court decided *House* in 1945, Congress did not permit habeas litigants to seek leave to appeal from this Court. Accordingly, the inmate faced a predicament then – no recourse for a mistaken denial of leave to appeal – that Mr. Hohn can only conjure today. No urgency, in short, supports his reliance on the Act under these circumstances. At the same time, the increasingly "express statutory provisions," established in 1948 and 1996, streamlining the appellate rights of habeas claimants prohibit continued reliance on the common law writ of certiorari in this setting.

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ARGUMENT

I. Article III Vests Congress With Power To Streamline Appellate Review Of Habeas Corpus Cases.

As a preliminary matter, Congress has authority to limit the Supreme Court's appellate "judicial Power" (U.S. Const., Art. III, § 1) in the way it did here. Apart from three discrete classes of original jurisdiction cases, the Constitution provides that "in all other Cases . . . the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Art. III, § 2. While the Court's "appellate powers 'are given by the constitution,' " they thus " 'are limited and regulated . . . by such [congressional] acts as have been passed on the subject.' " *Felker v. Turpin*, 116 S. Ct. 2333, 2339 (1996) (quoting *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810)).

No doubt some jurisdictional statutes might test the reach of Congress's power under the exceptions clause to close off all review of a habeas petitioner's complaint. But this is not one of them. For every appellate door that § 2253(c)(1) closes, it leaves open several others that allow inmates to seek relief from the Court. In this respect, the provision bears a similarity to the sections of the AEDPA at issue in *Felker v. Turpin*. Congress, there, also precluded a petition for a writ of certiorari to review a decision of a court of appeals exercising its gatekeeping function over a successive habeas petition, but at the same time did not repeal the Court's authority to entertain an original petition for habeas corpus. Under those statutory circumstances, the Court concluded, there "can

be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2." *Id.* at 2339.

The same conclusion applies with equal – indeed, more – force here. Section 2253(c)(1) not only leaves open the Court's authority to entertain an original habeas action, *see* 28 U.S.C. 2241, but also allows the Court itself to entertain an application for a certificate of appealability. Authority to petition the Court directly for a certificate also defuses the risk that the Court might somehow lack authority to review lower-court decisions that "adopted divergent interpretations of the gatekeeper standard." *Felker*, 116 S. Ct. at 2342 (Souter, J., joined by Stevens, J., and Breyer, J., concurring). *See id.* (noting that, in the absence of such review, "the question whether the statute exceeded Congress's Exceptions Clause power would be open"). Because the same standard that governs lower-court gatekeeping decisions also governs the Court's decision, the Court necessarily will resolve such disputes through its own review of an application. As in *Felker*, in short, there is "no plausible argument" that Congress has exceeded its power under the Constitution in this instance. Suggestions to the contrary (Pet. Br. 39-40) should be rejected.

II. Under The Plain Terms Of Sections 1254(1), 1651, And 2253(c)(1), Congress Has Not Given The Supreme Court Certiorari Power To Review Unsuccessful Applications For A Certificate Of Appealability.

In addition to having the constitutional authority to foreclose certiorari review of habeas corpus gatekeeping

decisions, Congress has in fact exercised that power here. The relevant statutes provide as follows:

> **The Certificate-Of-Appealability Requirement**: "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from – (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255." 28 U.S.C. 2253(c)(1).
>
> **The Certiorari Statute**: "Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari. . . . " 28 U.S.C. 1254(1).
>
> **The All Writs Act**: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a).

In word and design, this trio of laws prevents the Court from exercising either statutory or so-called common law certiorari jurisdiction over Mr. Hohn's petition. **First**, in unbending terms, § 2253 erects a jurisdictional gate to appellate review of all failed habeas petitions. Such "an appeal may not be taken to the court of appeals," Congress has unequivocally mandated, save when a judge or justice gives the inmate permission to do so. The prerequisite of a certificate of appealability thus prohibits any "case" from entering the appellate court unless the right judge authorizes it. In the absence of such a certificate, the case never enters – and therefore is never "in" – the appellate court as required by § 1254(1).

Even aside from the prerequisite that a case be "in" the court of appeals, the requirement of a certificate of *appealability* under § 2253(c)(1) by itself ends all habeas cases that do not obtain the requisite leave. The provision is at once jurisdiction stripping and case ending. Congress purposefully set up a two-step process for reviewing district court habeas decisions, the first to screen appeals that warrant further review, the second to review deserving claims on the merits. The failure to meet the threshold requirement both terminates the federal courts' power to review the matter and the inmate's power to seek review of the district court decision elsewhere. The case is over. The inmate cannot go back to district court to obtain a final order; and he cannot correct any of the other jurisdictional defects that might initially have precluded review. The manifest point of the statute is to screen out meritless habeas appeals and finalize them.

Second, while it might be argued that Mr. Hohn's *application* for a certificate came into the court of appeals, that is not the same as doing what Congress required of him – to obtain permission to get his "case" in the appellate court. That, of course, never happened. And, to say that Congress meant to use the word "case" in § 1254 to allow certiorari review of certificate applications asks too much of the operative words. Not only is it awkward to think of a certificate-to-appeal-a-case as itself a "case," but that view makes even less sense in this statutory setting. The same provision (§ 2253(c)(1)) that allows Mr. Hohn to seek a certificate of appealability from the appellate court also allows him to seek one from the Supreme Court. Having once permitted Mr. Hohn to seek review in

this Court via a certificate application, no rational explanation exists for authorizing Court review of the court of appeals' certificate decision by certiorari under § 1254(1) or for that matter under § 1651. The former option does everything that the latter two options could possibly do for him.

Apparently recognizing that a denied certificate at the court of appeals level prevents the inmate from seeking certiorari, Congress wisely created a safety valve. It gave inmates permission to ask a justice (or the whole Court if the justice refers the matter) for a certificate of appealability, making certain that Congress's efforts to finalize meritless habeas appeals did just that, but only that.

Third, still another component of the statutory scheme bolsters this reading. When a prisoner seeks a certificate of appealability, he must do so issue by issue. That is to say, the application must detail "which specific issue or issues" meet the gatekeeping requirement of "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2) and (3). The court of appeals therefore may grant inmates permission to appeal some issues but not others. Yet, under that scenario, what happens next? May the inmate then seek statutory (or common law) certiorari of the denied issues while the court of appeals proceeds to review the accepted issues? If so, that imposes a unique two-track system of appellate review that will spawn a host of administrative oddities that Congress could not possibly have intended.

Take the problem of timing. Since petitioners have 90 days to file a writ, as well as ample time for opposition

and reply briefs, review of a certiorari petition customarily takes a minimum of 5-6 months from the date of decision, a minimum of 7-8 months when the petition overlaps with the summer recess, and occasionally longer (consider Mr. Hohn's petition, which took almost 9 months). Similar delay would presumably plague a § 1651 common law writ of certiorari, particularly one that (like Mr. Hohn's) was conceived as and then filed in the form of a statutory certiorari petition. *See* S. Ct. Rule 20.

In this setting, a court of appeals would face an awkward dilemma: either wait for this Court's certiorari decision before proceeding with all issues entitled to review, or bifurcate the case into the court-of-appeals-approved issues first with the Supreme-Court-approved issues to follow. No such dilemma arises, in conspicuous contrast, when litigants hew to the application process that Congress expressly created. Applications to the Court customarily take days or at most weeks to review, may be reviewed promptly during the summer recess, and accordingly would not compel a two-track system of review. While Congress perhaps could impose a bifurcated system of review on courts and litigants, it makes little sense to credit the legislature with that disfiguring intention when a more natural reading of the laws eliminates any such requirement.

Fourth, Mr. Hohn cannot tenably shoehorn his case into the language of the All Writs Act, which requires a common law writ of certiorari to be "necessary" or "appropriate" as well as to be "in aid" of the Court's jurisdiction. Surely it is not necessary to use § 1651 here. As Mr. Hohn well knows, indeed has now shown he

knows (Pet. Br. 45 n.34; Application by Arnold F. Hohn for a Certificate of Appealability (Jan. 20, 1998)), an inmate may permissibly file an application under § 2253(c)(1) to obtain a certificate of appealability from a justice or (if referred) the Court. *See Beavers v. Pruett*, 118 S. Ct. 621 (1997) (referring application for a certificate of appealability and a stay of execution to the Court). Just as it is not necessary to review Mr. Hohn's § 1651 request, it is not appropriate to do so either. Congress already gives inmates a procedure for ensuring that the certificate-application process goes fairly. He has now taken advantage of that option, making his efforts to expand § 1651 jurisdiction as inappropriate as they are gratuitous.

In addition to his inability to satisfy the necessary/appropriate requirement, Mr. Hohn cannot show that his § 1651 writ is "in aid" of jurisdiction. That remains implausible here since Mr. Hohn self-evidently is using § 1651 to create jurisdiction, not supplement it. It can never be true that § 1651 is "in aid" of jurisdiction that Congress elsewhere has expressly regulated and indeed taken away. Finally, in light of the availability of the certificate option, Mr. Hohn cannot meet another essential requirement. Under Supreme Court Rule 20(1), the applicant must show something that Mr. Hohn has not – "that adequate relief cannot be obtained in any other form."

III. Case Law Confirms This Interpretation.

A. Longstanding Precedent Emphasizes That Leave-To-Appeal Decisions May Not Be Reviewed Under § 1254(1).

1. Several Decisions of The Court Support This Interpretation.

House v. Mayo, 324 U.S. 42 (1945) (per curiam), addressed this issue in a context similar to this one. Confined in a State prison, the inmate filed a petition for habeas corpus in federal district court. The district court denied the petition, then denied a certificate of probable cause for an appeal. The inmate next filed an application for an appeal in forma pauperis but without requesting a certificate of probable cause. The appellate court denied the application, after which the inmate sought leave in this Court to file a petition for certiorari.

The Court determined that it lacked power to issue a statutory writ of certiorari. "Our authority under that section," the Court observed, "extends only to cases 'in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia.' " *Id.* at 44. Because "the case was never 'in' the court of appeals, for want of a certificate of probable cause," the Court continued, it lacked jurisdiction to review the case under Congress's jurisdictional requirements. *Id.*

Most recently, in *Davis v. Jacobs*, 454 U.S. 911 (1981), two members of the Court exchanged views about this same question. While the dialogue between Justices Rehnquist and Stevens failed to resolve whether the

court of appeals and accordingly could not be reviewed under § 1254(1).

In the words of Justice Rehnquist: "[A]ll" of the Court's cases "concede that there is no jurisdiction to grant a writ of certiorari where both the District Court and the Court of Appeals have denied a habeas corpus petitioner a certificate of probable cause to appeal." *Id.* at 915-19 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from the denial of certiorari). And in the words of Justice Stevens: "Because none of the petitioners obtained a certificate of probable cause, none of these cases was properly 'in' the Court of Appeals and therefore 28 U.S.C. 1254 does not give this Court jurisdiction over the petitions for certiorari." *Id.* at 912-14 (Stevens, J., respecting the denial of certiorari). *See also Jeffries v. Barksdale*, 453 U.S. 914 (1981) ("Since there was no certificate of probable cause issued in this case, it was never 'in' the Court of Appeals" and the Court therefore "cannot review it by writ of certiorari to that court") (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from the denial of certiorari); *McCarthy v. Harper*, 449 U.S. 1309 (1981) (Rehnquist, J., in chambers).

In several other decisions, the Court has followed this course. In *Bilik v. Strassheim*, 212 U.S. 551 (1908), and *Ex Parte Patrick*, 212 U.S. 555 (1908), the Court disposed of two cases without opinion under a forerunner of § 2253. At the time, Congress did not allow the Court to review an unsuccessful habeas petition in the absence of a certificate of probable cause issued by a justice of the Court or of the federal district court that had denied the petition. In the words of the 1908 statute, "no appeal to the Supreme Court shall be allowed unless" the petitioner

makes the requisite showing. Against this backdrop, the Court concluded that it lacked jurisdiction to allow direct appeals in cases in which no certificate had issued.

Ferguson v. District of Columbia, 270 U.S. 633 (1926) (per curiam), reached a like conclusion. At stake was whether the Court had jurisdiction to review the refusal of a justice of the court of appeals of the District of Columbia to allow a writ of error to the police court of the District. No such authority existed, the Court held, and therefore denied a petition for a writ of certiorari "for want of jurisdiction in this [C]ourt." *Id.* at 634. And in *In re 620 Church Street Bldg. Corp.*, 299 U.S. 24 (1936), the Court declined to exercise its statutory certiorari powers over a bankruptcy confirmation plan that the court of appeals had declined leave to appeal. Because the "Circuit Court of Appeals declined jurisdiction," it concluded that the case involved an "instance[ ] not covered by" the Court's jurisdiction under the certiorari statute. *Id.* at 26. *Cf. Kennedy v. Lainson*, 323 U.S. 780 (1944) (denying "for want of jurisdiction" a petition for a writ of certiorari to a district court). In the last analysis, no opinion of the Court, nor for that matter a single separate opinion of a justice, to *amicus curiae*'s knowledge, has ever stated that the Court may use its statutory certiorari power to review decisions denying leave to appeal.

Nor has Congress made any changes to the pertinent laws that could possibly alter these conclusions. For example, in *House* and *Davis*, the statutory provision regarding certiorari required the "case" to be "in" the court of appeals, just as it does today. *See* Appendix. And the relevant portions of the certificate-of-probable-cause

requirement in *House* and *Davis* resemble today's certificate-of-appealability prerequisite. Both say that "an appeal may not be taken" in the absence of permission from the right judge. *See* Appendix.

What changes there have been, moreover, cement these conclusions. In its current form, § 2253(c)(1) requires a certificate of *appealability*, not one of probable cause. Yet that only goes to emphasize the severity of the screening function Congress has mandated. Likewise, the predecessor of § 2253 at issue in *House* did not permit an application to be filed with a justice of this Court, while the modern version does. But that, too, offers little solace to Mr. Hohn. That the inmate today may seek a certificate of appealability from the Court under § 2253(c)(1) makes all the more unnecessary the stretched reading of § 1254(1) that Mr. Hohn asks the Court to embrace.

2. Mr. Hohn's Contrary Arguments Are Mistaken.

To all of this, Mr. Hohn offers several responses, each unpersuasive. He first claims (Pet. 15-16) that the Court in practice has not always adhered to these requirements. There are several decisions, he points out, that issue writs of certiorari to review denials of certificates of probable cause; and there is one case (*In re Burwell*, 350 U.S. 521 (1956)), he adds, in which the Court exercised jurisdiction over questions certified by the Ninth Circuit under the predecessor to § 1254(2), even though the statute required a "case" to be "in" the court of appeals and the appellate court had denied leave to appeal. Yet neither this alleged general practice nor the specifics of *Burwell* supply the

support Mr. Hohn needs. It is a basic principle of this Court's jurisprudence that "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans v. Lavine*, 415 U.S. 528, 532 n.5 (1974). *See also FEC v. NRA Political Victory Fund*, 115 S. Ct. 537, 542 (1994); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 n.4 (1989).

As the federal government acknowledges (Br. 26), this venerable principle disposes of Mr. Hohn's argument. Not one of the cases Mr. Hohn cites, including *Burwell*, discusses the jurisdictional question, to say nothing of mentioning the statutory language that governs it. Any way one looks at it, Mr. Hohn's reliance on a series of orders and decisions that fail to address the jurisdictional issue cannot support his position, let alone show that the Court has indiscreetly overruled these earlier rulings.

Next, Mr. Hohn argues (Pet. 35-36) that in Congress's efforts to place additional restrictions on the appeal of meritless habeas claims through passage of the AEDPA, it somehow altered the *House* conclusion that inmates may not seek certiorari under § 1254 to review a denied leave-to-appeal. Another provision of the AEDPA, he points out, specifically prohibits an unsuccessful petitioner from filing a writ of certiorari, while section 2253 does not – leading to the inference (he claims) that Congress meant to allow certiorari review in one setting but not the other. True, the AEDPA sets up a gatekeeping requirement for first and successive federal habeas petitions. True also,

Congress specified that certiorari review was not available for successive gatekeeping decisions while declining to reiterate the *House* conclusion for initial gatekeeping decisions.

There, however, the comparison ends. The two settings serve utterly distinct functions. With respect to the first federal habeas setting, the gatekeeping provision serves the certificate-of-probable-cause function addressed in *House*: Does the inmate's claim have sufficient merit to warrant further review? In the successive habeas setting, the gatekeeping provision serves a different function. It asks not whether an appeal may proceed but whether any petition at all may be filed. Under these circumstances, Congress acted sensibly in tying a double, as opposed to a single, statutory knot precluding certiorari review. While prior successive federal habeas petitioners often faced stringent requirements, they never faced a hurdle to any district court consideration at all.

Just as consequentially, the inmate seeking leave to file a successive habeas petition has no option of filing an application to the Supreme Court in the event the court of appeals denies his or her request. In stark contrast, first federal habeas petitioners may freely file an application to the Court when the lower court denies leave. In the first federal habeas setting, in other words, Congress had little reason to worry about confirming that certiorari was precluded. Not only did *House* already establish the point, but the express provision for relief from the Court through a certificate application supplied ample clarification that the certificate, not certiorari, was the appropriate vehicle for responding to a denied leave-to-appeal.

Far from supporting Mr. Hohn's position, *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), undermines it. *Lindh* asked whether a specific retroactivity provision in Chapter 154 of the Act (regarding capital cases) implied a lack of retroactivity for a provision in Chapter 153 regarding the standard for obtaining habeas relief. That was an apples-to-apples comparison. For in that setting nothing about the difference between the two provisions offered a meaningful reason for Congress to specify a date-of-application in one section but not the other, except to imply (as *Lindh* concluded) that the new rules apply to pending cases in the first but not the second setting. The same cannot be said here. In the context of first federal habeas, Congress clearly spelled out a procedure for seeking relief from the Court when leave to appeal was denied. Yet, in the successive habeas context, it chose not to do so, making the drafter's repetition wholly appropriate and wholly without implication for the other setting.

That leaves a few other contentions that Mr. Hohn has raised. What of the Court's cases concluding that it possesses jurisdiction to review decisions over which the court of appeals may have lacked jurisdiction? Does not review in that setting show that the Court has jurisdiction to decide a case that has not been permitted "in" the court of appeals? *See, e.g.*, Pet. Br. 23-26; *Nixon v. Fitzgerald*, 457 U.S. 731, 743 & n.23 (1982); *United States v. Nixon*, 418 U.S. 683 (1974).

The analogy does not hold. When it comes to the requirement of a final order, Congress has established a policy of avoiding piecemeal appeals. That policy, however, only goes to the efficiency of appellate review, not to the objective of terminating it altogether. In telling

contrast, the whole point of the gatekeeping requirement, from its initial appearance in 1908 to the present, has been to curb "frivolous habeas corpus petitions" by requiring that a "prisoner first obtain a certificate of probable cause to appeal before being entitled to do so." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.3 (1983). *See id.* at 892 ("Congress established the requirement that a prisoner obtain a certificate of probable cause to appeal in order to prevent frivolous appeals from delaying the States' ability to impose sentences"). *See also Jeffries v. Barksdale*, 453 U.S. 914, 916 (1981) ("the clear congressional purpose" of section 2253 is "to impose the certificate-of-probable-cause requirement as a means of *terminating* frivolous appeals in certain habeas corpus cases") (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from denial of certiorari); Blackmun, *Allowance of In Forma Pauperis Appeals In Section 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 351 (1967) ("a certificate of probable cause is a requisite to an appeal").

The *Nixon* cases merely teach that the Court has power to assess its own jurisdiction. 457 U.S. at 743 n.23, 418 U.S. at 692. That is why the Court had jurisdiction then to review the court of appeals' interpretations of the final-order doctrine and why the Court has jurisdiction now to assess its authority to review Mr. Hohn's petition. But that does not say anything about whether jurisdiction over the lower-court decision in fact exists – whether, here, the Court in fact may review the court of appeals' denial of Mr. Hohn's application for a certificate of appealability. Nothing about the *Nixon* cases undermines, let alone overrules, *House v. Mayo*'s conclusion that the Court lacks statutory-certiorari jurisdiction to review a

claimant's failure to obtain leave to appeal. Still less helpful are the cases reviewing denials of leave to appeal *in forma pauperis*. *See, e.g, Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948). They not only fail to address the jurisidictional issue; but they relate to a statute that by its terms is not designed to streamline and terminate appeals, but rather to facilitate them.

As a final reason for overruling *House v. Mayo*, Mr. Hohn argues (Pet. Br. 17-21) that certificate-of-appealability applications fall within the broad definition of "case" and therefore meet the statutory requirements. But even the broadest conceptions of the term, *see, e.g., Forsyth v. Hammond*, 166 U.S. 506 (1897), cannot make an application-to-appeal-a-case itself a case. Nor at any rate is it appropriate to lose sight of the overriding design of § 2253. Why would the legislature try to curb habeas review by expanding it? What explanation, in other words, could there possibly be for permitting applications to justices of the Court *as well as* certiorari jurisdiction? A reading of §§ 1254(1) and 2253(c)(1) that permits two-track review of denials for leave to appeal not only would fail to curb the lack-of-finality problem that prompted the legislation, *Barefoot v. Estelle*, 463 U.S. at 892-93, but would positively exacerbate the law's delays – by forcing governments and courts to consider two (rather than just one) attempt at review and by leading to multi-track review of the court-of-appeals-approved-issues and the Supreme-Court-approved issues. *See infra*. The national legislature deserves more credit than that.

B. Precedent Demonstrates That The Court May Not Review An Application For A Certificate Of Appealability Under The All Writs Act.

Besides lacking power to review Mr. Hohn's petition under its statutory certiorari authority, the Court also lacks power to do so under the All Writs Act. Only the most extraordinary circumstances warrant review under the All Writs Act, and there is nothing extraordinary about Mr. Hohn's situation. Whatever the scope of the so-called common law certiorari power under § 1651, moreover, it does not empower the Court to create jurisdiction that Congress has expressly addressed elsewhere or indeed taken away.

1. Mr. Hohn's Petition Raises No Urgency And Asks The Court To Construe § 1651 To Create Jurisdiction That Congress Has Expressly Addressed Elsewhere.

Consistent with the text of the All Writs Act, the Court has made clear that necessity remains a threshold requirement for invoking power under the provision. The " 'Act is a residual source of authority to issue writs that are not otherwise covered by statute.' " *Carlisle v. United States*, 116 S. Ct. 1460, 1467 (1996) (quoting *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 43 (1985)). The Act at most "empowers federal courts to fashion extraordinary remedies when the need arises," *United States Marshals*, 474 U.S. at 43; it does not allow courts to use it "whenever compliance with statutory procedures appears inconvenient or less appropriate," *id.* For these reasons, one seeking the writ must

meet the "burden of showing that its right to issuance of the writ is 'clear and indisputable.' " *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953) (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899)).

One test for discerning such urgency, the Court has indicated, is the existence of "alternative means" for providing relief. *United States Marshals*, 474 U.S at 42 n.7. "[W]hatever may be done without the writ," in other words, "may not be done with it." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953). *See also Ex Parte Peru*, 318 U.S. 578, 584 (1943) ("[t]he common law writs, like equitable remedies, . . . are usually denied where another adequate remedy is available"). In accordance with this requirement, the Supreme Court's Rules warn litigants that "[t]o justify the granting of any such writ, the petition must show," among other things, "that adequate relief cannot be obtained in any other form or from any other court." S. Ct. Rule 20(1).

Whether one considers the general requirement of "exceptional circumstances" or the more specific one of "alternative" avenues of relief, Mr. Hohn comes up short in either event. Above all else, Mr. Hohn's position is neither unusual nor dire because he may file an application for a certificate of appealability with a justice of the Court. This device provides all the individual relief any inmate could need, most notably because it empowers the Court to allow the appeal to proceed. The device also authorizes the Court to clarify the meaning of the gatekeeping standard, as the Court is free to (indeed must) interpret the test in reviewing the application itself. In the last analysis, while the All Writs Act no doubt provides "extraordinary remedies," they "are reserved for really

extraordinary causes." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 385 (1953) (quotation omitted). This simply is not one of them.

Mr. Hohn's reliance on the All Writs Act fails for a second, independent reason. While urgency may be a necessary precondition for invoking the Act, the Court has made clear that it is not by itself a sufficient explanation for exercising power under the Act. Section 1651 thus is a "residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Carlisle v. United States*, 116 S. Ct. at 1467 (1996) (quotation omitted). The Court therefore has "rejected use of the all writs provision to enable the Court to review a lower court's determination where jurisdiction did not lie under an express statutory provision." *United States Marshals*, 474 U.S. at 41.

Consistent with these views, *Carlisle* refused to allow a litigant to rely on the All Writs Act to file a motion for a judgment of acquittal one day after the time limit prescribed by the Rules of Criminal Procedure. Even though the delay was counsel's fault, not the defendant's, and even though the district court determined that it would acquit the individual, the Court concluded that since Rule 29 "specifically addresses the particular issue at hand," the All Writs Act does not apply. 116 S. Ct. at 1467 (quotation omitted). In like manner, *United States Marshals* declined to authorize a district court judge under the Act to order federal marshals to transport State prisoners to testify as witnesses at a § 1983 hearing. Because several federal statutes established procedures relating to

the "issue at hand," the Court reversed the lower court decision, relying on case law "reject[ing] use of the all writs provision to enable the Court to review a lower court's determination where jurisdiction did not lie under an express statutory provision." 474 U.S. at 41 (citation omitted).

This modern view rests on the shoulders of several earlier cases. In *U.S. Alkali Export Assn. v. United States*, 325 U.S. 196, 203 (1945), for example, the Court came to a similar conclusion:

> The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews.

U.S. Alkali, it is true, ultimately allowed review of a non-final order by writ of certiorari. But it did so not because the All Writs Act may be "used as a substitute for an authorized appeal" but because the district court was charged with exceeding a limitation placed on its jurisdiction by Congress. *Id.* at 203-04. That explanation may just as easily justify a writ of prohibition as distinct from one of certiorari. At any rate, the exception is sound. For like reasons, this Court could exercise its all writs power to prevent a court of appeals from reviewing a first federal habeas petition *after* leave to appeal had been *denied*. The *U.S. Alkali* exception for lower courts that overstep their jurisdictional boundaries, in other words, simply proves the general rule.

Other cases invoke the general rule as well. *See, e.g., De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945) ("When Congress withholds interlocutory reviews, [the All Writs Act] can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power"); *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 27-28 (1943) (the All Writs Act "may not be resorted to as a mode of review where a statutory method of appeal has been prescribed") ("Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart Congressional policy"); *United States v. Beatty*, 232 U.S. 463, 467-68 (1914) (the common law writ of certiorari may not be used as a substitute for an authorized appeal); *In re Commonwealth of Massachusetts*, 197 U.S. 482, 488 (1905) ("in cases over which we possess neither original nor appellate jurisdiction we cannot grant . . . certiorari as ancillary thereto"); *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 601-02 (1821) (the Act was "intended" only to "vest the power . . . in cases where the jurisdiction already exists, and not where it is to be courted or acquired, by means of the writ proposed to be sued"); *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813). As these cases illustrate, the Act does not empower the Court to exercise jurisdiction that Congress has elsewhere expressly addressed.

In light of this case law, Mr. Hohn may not use the All Writs Act to escape the requirements of §§ 2253 and 1254. From 1908 forward, Congress has been steadfast in

curbing frivolous habeas cases by enacting and reenacting legislation that denies inmates leave to appeal meritless claims. Plainly, this is a case in which there is not just one, but two, "express statutory provision[s]" that already address the jurisdictional issue. Just as Mr. Hohn could not use the All Writs Act to sidestep the 90-day limitation for filing a statutory petition for a writ of certiorari, *see* 28 U.S.C. 2101(c), he may not use it to circumvent the requirements of §§ 2253 and 1254.

A reading of § 1651 that allows inmates to escape the jurisdictional imperatives of these specific provisions also slights the singlemindedness of Congress's efforts to curb endless habeas review. It presumes that the same government body with stewardship over §§ 2253(c)(1) and 1254(1) somehow meant to defeat these efforts through § 1651. And, worse, it transforms the All Writs Act from a "sparingly exercised" (*Parr v. United States*, 351 U.S. 513, 520 (1956)) "residual source of authority" concerning cases within the Court's jurisdiction (*Carlisle v. United States*, 116 S. Ct. 1460, 1467 (1996)) into a roving "source of jurisdiction." No cases support this view, and several positively reject it. The invitation should be rejected, the Court's cases preserved, and Congress's sensible and express legislative design left intact.

2. Neither *House v. Mayo* Nor Any Other Decision Alters This Conclusion.

Neither *House v. Mayo* nor any of the other cases upon which Mr. Hohn and the federal government have relied alter this conclusion. No doubt, from all that appears on the face of *House v. Mayo*, there would seem to

be little reason to adhere to the first half of the opinion (which precludes jurisdiction under § 1254(1)) while disregarding the second (which permits jurisdiction under § 1651). But an examination of the statutes at issue in *House* eliminates any such inconsistency.

When the Court decided *House* in 1945, all three pieces of this statutory puzzle were in place – the gatekeeping requirement, the All Writs Act and the certiorari statute. Yet, while the All Writs Act and § 1254 paralleled in meaningful respects the language of the statutes today, *see* Appendix, the same cannot be said about the gatekeeping requirement. Unlike the modern version of § 2253, the 1945 law did not permit an application to a justice of the Supreme Court. It allowed leave only from "the United States court by which the final decision was rendered or a judge of the circuit court of appeals." 28 U.S.C. 466 (1940); *see* Appendix.

The change in law is dispositive, first because it eliminates any urgency, and second because it (together with the AEDPA) supplies the kind of "express statutory" direction that precludes reliance on the All Writs Act. Nothing about Mr. Hohn's situation today compares with the predicament that Mr. Mayo faced in 1945. Once the court of appeals denied leave to appeal, Mr. Mayo had nowhere to go but the All Writs Act to correct a seemingly mistaken interpretation of the gatekeeping requirement. Mr. Hohn, of course, has no such problem. He may file an application with a justice of the Court, which at once provides a congressionally-approved method for dispensing individual justice and a vehicle for ensuring uniform treatment of the gatekeeping standard. Under these circumstances, Mr. Hohn cannot tenably claim that

he is asking the Court to do something Congress has authorized under the Act, which is to say "fashion extraordinary remedies when the need arises." *United States Marshals*, 474 U.S. at 43. Whether such urgency existed in 1945 or not, it plainly does not exist today.

Likewise, by specifically granting inmates the option of seeking leave to appeal from this Court in 1948 and by enacting the detailed – and more stringent – provisions of the AEDPA in 1996, Congress supplied the kind of deliberate statutory direction that precludes resort to the All Writs Act. As the cases frequently repeat, the Act may not "enable the Court to review a lower court's determination where jurisdiction did not lie under an express statutory provision." *United States Marshals*, 474 U.S. at 41. The specifics of § 2253 regarding the path for reviewing habeas corpus petitions, coupled with the prescribed route for seeking review under § 1254, make continued existence of a statutory-common-law writ of certiorari as anachronistic in this setting as it is confusing.

Like *House v. Mayo*, each of the other cases upon which the federal government and Mr. Hohn rely either fail to address the jurisdictional issue or involve a situation in which the requirements of § 1651 had been met. In *In re 620 Church Street*, 299 U.S. 24 (1936), for instance, the Court invoked the Act to review a district court's confirmation of a plan of bankruptcy reorganization. But it did so not just because statutory certiorari jurisdiction did not exist (that would vest jurisdiction over any lower court order), but because the "auxiliary process" of the writ was "a means of giving full force and effect to *existing appellate* authority and of furthering justice in other kindred ways." *Id.* at 26 (emphasis added) (internal

quotation omitted). Unlike a bankruptcy reorganization plan, which the Court may later review after a final order has been obtained, no "existing appellate authority" is available over the denial of a leave to appeal – unless or until a judge or justice grants leave. Without such leave, in other words, a habeas case terminates under federal law, while a bankruptcy case does not.

Nor, under these circumstances, may even such an agreeable standard as "furthering justice" assist Mr. Hohn. He cannot show that a single injustice has come his way until the Court denies his application. The greater the injustice he claims at the hands of the court of appeals, moreover, the less likely the Court will deny an application. The same problem exists under – and defeats – other broad characterizations of the standard for using the writ – *e.g.*, "its use must only be 'reasonably necessary in the interest of justice.' " U.S. Br. 32 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 274 (1942)). Even a test of reasonable necessity must meet the Court's own rules for granting extraordinary writs, which require a showing that "adequate relief cannot be obtained in any other form." S. Ct. R. 20(1). The certificate option defeats any such showing.

Policy considerations also do not favor altering this congressional framework. Surely a court of appeals' gatekeeping decision "in violation of equal protection or other fundamental constitutional principles" (U.S. Br. 30) will not stand in the way of an application decision by this Court reminding lower courts of the correct standard. Contrary to Mr. Hohn's suggestion (Br. 30), moreover, once a justice refers such an application to the whole Court, the Court plainly may issue a decision that

constitutes "binding precedent." Nor is the application process that Congress created "a clumsy and burdensome" way (U.S. Br. 32) for ensuring uniform interpretation of the gatekeeping standard or for preserving the Court's ultimate right to review the merits of a habeas petition. In this case, for example, how does the application relief to which Mr. Hohn may be entitled differ in any meaningful way from the grant-vacate-remand order that the Solicitor General has proposed? Both simply prevent the case from being terminated, and both orders may convey as little or as much direction as the Court wishes. Such concerns at any rate are best addressed to the members of Congress, who are sure to reply that the system of review they have allowed represents a vast improvement on the two-track system that review by common law certiorari *and* certificate application would compel.

IV. Mr. Hohn's Other Arguments Exceed The Scope Of The Question Presented, And Have Been Waived.

Mr. Hohn also asks (Br. 40-49) the Court to treat his petition as an application for a certificate of appealability, and to consider whether the certificate requirement should apply to him even though he filed his appeal after the AEDPA became effective. Both requests should be rejected.

In each respect, Mr. Hohn seeks to expand the scope of the narrow jurisdictional question that the Court asked to be briefed and argued. Neither one of these contentions, moreover, was mentioned in the petition for a writ of certiorari, and one (application of the gatekeeping

standard to the appeal) was not even raised below. Mr. Hohn's petition plainly assumed that the gatekeeping requirement applies. Indeed, the thrust of the petition was that the Court should grant certiorari to resolve a lower-court division of authority over the meaning of the test. On this record, the Court properly granted certiorari to review a jurisdictional question that assumes the applicability of the Act to this appeal. It is wholly appropriate to continue to resolve the petition on that assumption, since Mr. Hohn initiated it and the Court had every reason to accept it. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 280 (1993) (observing that "the Petition for Certiorari (not the Brief in Opposition and later briefs) . . . determines" scope of the petition); *Parker v. Randolph*, 442 U.S. 62, 77 (1979) (plurality) ("Although petitioner sought review of this ruling, our grant of certiorari was limited to the [one] issue").

Nor will Mr. Hohn suffer any discernible harm if the Court declines to convert the petition into an application to a justice or the Court. No time restrictions curb Mr. Hohn's authority to file an application. He remains free to file one after the jurisdictional issue has been resolved, or he may file a protective application (as he now has done) in the event he loses the jurisdictional issue. Because he was recently placed on parole (Pet. Br. 4), he also has regained one of the most vital interests that a § 2255 motion seeks to vindicate. At all events, because Mr. Hohn now has filed an application to Justice Thomas for a Certificate of Appealability, *amicus curiae* intends to seek leave of Court to file a response to the application, which would seem to be the proper jurisdictional route for addressing these matters.

• • •

One might fairly ask what difference all this makes. Does it really matter whether the Court has jurisdiction to review this matter under its statutory certiorari powers, as Mr. Hohn claims, under its common-law certiorari powers, as Mr. Hohn and the federal government claim, or under its certificate-of-appealability powers, as the parties and *amicus curiae* agree?

The question, of course, does matter: It implicates the Court's unique and most essential power. At stake is whether Congress vested the Court with jurisdiction to review Mr. Hohn's petition, then (if it did) whether federal prosecutors violated the United States Constitution in convicting Mr. Hohn. Rightly appreciating that "[f]ederal courts are courts of limited jurisdiction" that "possess only that power authorized by Constitution and statute," *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994), the Court long has been careful to avoid "expand[ing] by judicial decree" the statutory jurisdiction that Congress has given it, *id.*

In modestly "presum[ing] that a cause lies outside this limited jurisdiction," the Court has placed the "burden of establishing the contrary" "upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377 (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936)). *See also Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810). This self-deprecating "practice of strict construction of statutes authorizing appeals," the Court has emphasized, "dictates that we not give an expansive interpretation" of such laws. *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1976) (per curiam). Even

when "there is a present need to expand the jurisdiction of [the federal] courts," the Court has reminded litigants that it will not "overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts." *Snyder v. Harris*, 394 U.S. 332, 341-42 (1969).

This custom of jurisdictional self-restraint makes sense for the branch of government responsible for reviewing every other branch's compliance with the rule of law. By erring on the side of denying for itself rather than seizing power, by ensuring in other words compliance with the Constitution's delegation of authority to Congress to regulate the Court's appellate jurisdiction, the Court "teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

More than just example, however, explains the Court's discretion in this area. When the Court interprets grants of authority from Congress to itself, it wears two hats: It not only must construe the reach of power, but it then may exercise it as well. That distinguishes the dispute from all others in which the Court referees the extent of legislative or constitutional delegations of power. For example, when the Court construes a grant of power, say, to executive agencies, it remains appropriate to draw inferences from congressional ambiguity in favor of jurisdiction for the executive branch. *See Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). But, when the Court construes congressional grants of authority to itself, it acts as a referee and a player, making reticence uniquely appropriate. In the end, no rule of construction in favor of jurisdiction for the Court, or any other type of default rule (compare Pet. Br.

34-35, 40; U.S. Br. 14), applies here. If anything, the Court's careful practices point precisely in the opposite direction.

In the final analysis, however, default rules and other ambiguity crutches are not needed to resolve this dispute. The unmistakable words of the provisions themselves make clear that Mr. Hohn has just one mechanism, not three, for obtaining leave to appeal. It is the certificate of appealability that Congress explicitly provided by enacting 28 U.S.C. 2253(c)(1).

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for lack of jurisdiction.

Respectfully submitted,

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APPENDIX

I. The Gatekeeping Provision

A. 1908

> That from a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a State court no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance.

Act of March 10, 1908, ch. 76, 35 Stat. 40.

B. 1925

> From a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a State court no appeal to the circuit court of appeals shall be allowed unless the United States court by which the final decision was rendered or a judge of the circuit court of appeals shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or judge shall certify that there is probable cause for such allowance.

Act of February 13, 1925, ch. 229, §§ 6(d), 13, 43 Stat. 940, 942; 28 U.S.C. 466.

C. 1948

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

Act of June 25, 1948, ch. 646, § 2253, 62 Stat. 967, 28 U.S.C. 2253.

D. 1996 To Present

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. 2253(c) (Supp. II 1996).

II. The Certiorari Statute

A. 1891

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

Act of March 3, 1891, ch. 517, § 6, 26 Stat. 828.

B. 1911

In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

Act of March 3, 1911, ch. 231, § 240, 36 Stat. 1157.

C. 1925

In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States,

upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

Act of February 13, 1925, ch. 229, § 240(a), 43 Stat. 938.

D. 1988 To Present

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. 1254(1); *see* Act of June 27, 1988, Pub. L. 100-352, § 2(a), 102 Stat. 662; Act of June 25, 1948, ch. 646, 62 Stat. 928.

III. The All Writs Act

A. 1789

That all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

Judiciary Act of 1789, § 14, 1 Stat. 81.

B. 1911

The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Act of March 3, 1911, ch. 231, § 262, 36 Stat. 1162.

C. 1949 To Present

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. 1651(a); Act of May 24, 1949, ch. 139, § 90, 63 Stat. 102.

IV. Supreme Court Rule 20.1

Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.